

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

373A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 24,704

FILED FEB 1 1971

RETAIL CLERKS UNION, LOCAL 1000, *Nathan J. Paulson*
RETAIL CLERKS INTERNATIONAL ASSOCIATION, CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

ZINKE'S FOODS, INC., *Intervenor.*

On Petition to Review an Order
of the National Labor Relations Board

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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,704

RETAIL CLERKS UNION, LOCAL 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

ZINKE'S FOODS, INC., *Intervenor.*

**On Petition to Review an Order
of the National Labor Relations Board**



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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: **RETAIL CLERKS UNION, LOCAL 1401,
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO**

Case Nos. : 30-CA-372 and 30-RC-400

- 2.21.66 Petition filed by Retail Clerks Union, Local 1401, Retail Clerks International Association, AFL-CIO, dated
- 3.16.66 Stipulation for certification upon consent election, dated
- 3.16.66 Notice of Election to be held
- 3.16.16 Tally of Ballots of Election held
- 3.16.66 Certification on Conduct of Election held
- 3.24.66 Petitioner's ¹ objections to the election conducted on March 16, 1966, received
- 3.28.66 Petitioner's statement of position on objections and unfair labor practices, received
- 4. 1.66 Charge filed in Case No. 30-CA-372
- 4.11.66 Company's motion to overrule Petitioner's objections to conduct affecting the results of election, received
- 4.13.66 First amended charge filed in Case No. 30-CA-372
- 5.16.66 Regional Director's complaint and notice of hearing in Case No. 30-CA-372, dated
- 5.31.66 Company's answer to the complaint in Case No. 30-CA-372 received
- 5.18.66 Regional Director's report and recommendation

¹ Petitioner's herein was the Charging Party before the Board.

on objections to conduct affecting the results of the election in Case No. 30-RC-400, dated

- 6. 2.66 Board's order directing hearing in Case No. 30-RC-400, dated
- 6. 6.66 Regional Director's order consolidating cases and notice of hearing in Case No. 30-RC-400, dated
- 7. 5.66 A stipulation between the parties, received
- 7. 5.66 A stipulation between the parties, received
- 7. 5.66 Company's amended and supplemental answer, dated
- 7. 6.66 Company's second amended answer, dated
- 7. 6.66 General Counsel's amendment to complaint in Case Nos. 30-CA-372 and 30-RC-400
- 7. 6.66 Hearing Opened
- 7. 6.66 Hearing Closed
- 12.14.66 Trial Examiner's decision issued
- 1.16.67 Company's exceptions to the Trial Examiner's decision, received
- 2. 6.67 Petitioner's joint motion to consolidate cases and for oral argument, received
- 2.10.67 Company's motion to fix a date for filing of motions in opposition to joint motion to consolidate cases and for oral argument, received
- 2.10.67 Board's telegraphic order granting the date for receipt of motions in opposition to joint motion to consolidate cases, and for oral argument to February 21, 1967, dated
- 2.17.67 Company's opposition motion to joint motion to consolidate cases and for oral argument, dated

- 2.17.67 General Counsel's opposition to motion to consolidate, dated
- 3.16.67 Company's opposition to motion made in Case No. 25-CA-2377 to join in consolidation with and for oral argument in Case Nos. 30-CA-372 and 26-CA-2536, dated
- 5.26.67 Board's notice of hearing, dated
- 10. 7.70 Decision and Order issued by the National Labor Relations Board

Form NLRB-702
(11-70)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARDForm approved
August 1964, No. 64-0289 16
00 420

PETITION

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering them accordingly.

CASE NO.	30-RC-400
DATE FILED	February 21, 1966

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition (Check only the one for which it is appropriate)

- A. ☒ RC—CERTIFICATION OF REPRESENTATIVE (INDIVIDUAL, GROUP, LABOR ORGANIZATION).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to sections 9 (a) and (c) of the act.⁹
- B. ☐ RM—REPRESENTATION (EMPLOYEE).—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.⁹
- C. ☐ RD—DE-RECOGNITION.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9(a) of the act.⁹
- D. ☐ UD—UNFAIR LABOR PRACTICES OF UNION EMPLOYER.—They present (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be suspended.

NOTE.—If a change under section 10(c)(7) of the act has been made touching the Employer named herein, the statement following the description of the type of petition shall not be deemed made.

2. NAME OF PERSON OR PERSONS REPRESENTING TO COMBAT
Zinke's Food Market Messrs. Fred & Gordon Zinke
FBI NO. 160101

3. ADDRESS OF ESTABLISHMENT WHEREIN (Name and number, city, state, and State)

1515 Madison Road, Beloit, Wisconsin

4a. TYPE OF ESTABLISHMENT (Factory, store, warehouse, etc.)

Retail supermarket

4b. INDUSTRY, TRADE, BUSINESS OR SERVICE

Foodstuffs

5. Description of Unit Involved (If more space is needed, attach as another sheet)

Included All regular full-time and regular part-time employees.

6c. NUMBER OF EMPLOYEES IN UNIT
27

Excluded Janitors, employees in the meat department, store manager, watchmen, guards and supervisors.

6d. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?
☒ YES ☐ NO

(If not filed during last 90 days in U.S. above, check and complete BOTH items 7a or 7b, whichever is applicable)

7a. ☒ Request for recognition as Bargaining Representative was made on February 14, 1966 and Employer refused recognition on or about February 16, 1966 (If no reply received, so state)7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognition or Contracted Bargaining Agent (If there is none, so state)

NAME NONE AFFIDAVIT DATE OF RECOGNITION OR CONTRACT

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Show month, day, and year)

NONE

10. IF YOU HAVE CHECKED YES ON 7a OR 7b ABOVE, SHOW THE DATE OF TERMINATION OF AGREEMENT (Show month, day, and year)

11a. IS THERE NOW A STATE OF RECEIVING AT THE EMPLOYER'S ESTABLISHMENT? SUPERVISOR YES NO X

11b. IF NO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING

11c. THE EMPLOYER HAS BEEN FINED BY AN ORDER OF (Insert name) A 1960

12. DISCLOSURES ON INDIVIDUALS OTHER THAN PETITIONER (AND OTHER NAMES THOSE NAMED IN ITEMS 9 AND 11c, WHICH HAVE CLAIMED SUCCESSION AS SUPERVISORS, AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEM 5 ABOVE. (If none, so state.)

NAME	ADDRESS	DATE OF CLAIM (Required only if Petitioner is filed by Employer)
NONE		

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Retail Clerks Union, Local No. 1401, Retail Clerks International Association, AFL-CIO

By John P. Voller (Signature of representative or person filing petition) Secretary-Treasurer

Address 301 East Johnson Street, Madison, Wisconsin 53703 257-4609 (Telephone number)

EMPLOYER'S NAME AND ADDRESS (If not known, so state)

U.S. GOVERNMENT PRINTING OFFICE: 1964-0-289-16

STIPULATION FOR CERTIFICATION UPON CONSENT ELECTION

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act, as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby AGREE AS FOLLOWS:

1. **SECRET BALLOT.**—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedures and policies of the Board.

2. **ELIGIBLE VOTERS.**—The eligible voters shall be those employees included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements, but *excluding* any employees who have since quit or been discharged for cause and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike which commenced more than twelve (12) months prior to the date of the election and who have been permanently replaced. At a date fixed by the Regional Director, the parties, as requested, will furnish to the Regional Director, an accurate list of all the eligible voters, together with a list of the employees, if any, specifically excluded from eligibility.

3. **NOTICES OF ELECTION.**—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The parties, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. **OBSERVERS.**—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. **TALLY OF BALLOTS.**—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties.

6. **POST-ELECTION AND RUN-OFF PROCEDURE.**—All procedure subsequent to the conclusion of counting ballots shall be in conformity with the Board's Rules and Regulations.

7. **RECORD.**—The record in this case shall be governed by the appropriate provisions of the Board's Rules and Regulations and shall include this stipulation. Hearing and notice thereof, Direction of Election, and the making of Findings of Fact and Conclusions of Law by the Board prior to the election are hereby expressly waived.

8. **COMMERCE.**—The Employer is engaged in commerce within the meaning of Section 2(6) of the National Labor Relations Act, and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c). (Insert commerce facts.) **Zinke's Foods, Inc.,** is a Wisconsin corporation engaged in the retail sale of grocery and related products. In the past year, a representative period, the Employer had gross sales in excess of \$300,000, and purchased goods from firms which, in turn, purchased goods directly from outside the State in excess of \$50,000.

9. **WORDING ON THE BALLOT.**—Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot, or if the occasion demands, from top to bottom. (If more than one union is to appear on the ballot, any union may have its name removed from the ballot by the approval of the Regional Director of a timely request, in writing, to that effect.)

First.

Second.

Third.

10. **PAYROLL PERIOD FOR ELIGIBILITY.**— February 25, 1966

11. **DATE, HOURS, AND PLACE OF ELECTION.**—

Date: Wednesday, March 16, 1966
Hours: 5:30 p.m. to 6:30 p.m.
Place: Lunch Room

RECORDED

12. **THE APPROPRIATE COLLECTIVE BARGAINING UNIT.**— All full-time and regular part-time employees of the Employer at its Beloit, Wisconsin store excluding meat department employees, office clerical employees, guards and supervisors as defined in the Act.

Store manager

If Notice of Representation Hearing has been issued in this case, the approval of this stipulation by the Regional Director shall constitute withdrawal of the Notice of Representation Hearing heretofore issued.

ZINKE'S FOODS, INC.,
(Employer)

1315 Madison Road, Beloit, Wisconsin
(Address)

By *Ken J. Mueller* 3-3-66
(Name and Title) (Date)

Attorney for Employer

Recommended: *George J. Smith* 3/3/66
(Name and Title) (Date)

Date approved: 3 4/66
(Date)

Ray Spillholz, Jr.
Regional Director,
National Labor Relations Board.

RETAIL CLERKS UNION, LOCAL NO. 1401, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO
(Name of Organization)

301 East Johnson Street, Madison, Wisconsin
(Address)

By *Ray E. Smith* 3/3/66
(Name and Title) (Date)

(Name of other Organization)

(Address)

By _____ (Name and Title) (Date)

Case No. 30-RC-400

0-0 000-043

U.S. GOVERNMENT PRINTING OFFICE: 1955-0-255555

CERTIFICATION ON CONDUCT OF ELECTION

STIPULATION

Name of employer ZINKE'S FOODS, INC. Case No. 30-RC-400

Date of election March 16, 1966 Place Beloit, Wisconsin

The undersigned acted as agents of the Regional Director and as authorized observers, respectively, in the conduct of the balloting at the above time and place.

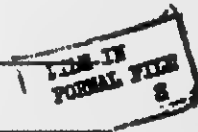
WE HEREBY CERTIFY that such balloting was fairly conducted, that all eligible voters were given an opportunity to vote their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

For EMPLOYER

For the Regional Director, Thirtieth Region

Edward Klamut

George Strick



For PETITIONER

For

Edward M. Klamut

NLRB 797
(2-62)UNITED STATES
NATIONAL LABOR RELATIONS BOARD**NOTICE OF****RIGHTS OF EMPLOYEES**

Under Section 7 of the National Labor Relations Act, employees have the right to self-organization; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

PURPOSE OF ELECTION

An election by secret ballot will be conducted, under the supervision of the Regional Director of the National Labor Relations Board, among the eligible voters described herein, to determine the representative, if any, desired by them for the purpose of collective bargaining with their employer.

SECRET BALLOT

The election will be by SECRET ballot. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to the Regional Director or his agent in charge of the election. Your attention is called to Section 12 of the National Labor Relations Act.

ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN \$3,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

An agent of the Board will hand a ballot to each eligible voter at the voting place. The voter will then mark his ballot in secret in a voting booth and fold it. The voter will then personally deposit the folded ballot in a ballot box under the supervision of an agent of the Board. The majority of the valid ballots cast will determine the results of the election. Incorporated herein, for your information only, is a copy of the official ballot.

AUTHORIZED OBSERVERS

Each of the interested parties may designate an equal number of observers, this number to be determined by the Regional Director or his agent in charge of the election. These observers will (a) act as checkers at the voting place and at the counting of ballots, (b) assist in the identification of voters, (c) challenge voters and ballots, and (d) otherwise assist the Regional Director or his agent.

ELIGIBILITY RULES

Employees described under VOTING UNIT in this Notice of Election who did not vote during the designated payroll period because they were ill or on vacation or temporarily laid off and employees in the military service of the United States who appear in person at the polling place will be eligible to vote. Also eligible are those employees engaged in an economic strike who commenced less than twelve (12) months before the election date and who retained their status such during the eligibility period, and their replacements. Employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof; and who have not been rehired or reinstated prior to the date of the election, and employees engaged in an economic strike who commenced more than 12 months prior to the date of the election and who have been permanently replaced, shall not be eligible to vote.

CHALLENGE OF VOTERS

The challenge of a voter MUST be made before the voter has deposited his ballot in the ballot box.

INFORMATION CONCERNING ELECTION

The Act provides that only one valid representation election may be held in a 12-month period. Any employee who desires to obtain any further information concerning the terms and conditions under which this election is to be held or who desires to raise any question concerning the holding of an election, the voting unit, or eligibility rules may do so by communicating with the Regional Director or his agent in charge of the election.

THIS IS THE ONLY OFFICIAL NOTICE OF

OF AMERICA
RELATIONS BOARD

ELECTION

NAME OF COMPANY

ZINK'S FOODS, INC.
Beloit, Wisconsin

30-80-400
Stipulation

VOTING UNIT

Those eligible to vote are all full-time and regular part-time employees of the Employer at its Beloit, Wisconsin store, who were employed during the payroll period ending February 25, 1966, excluding meat department employees, store manager, office clerical employees, guards and supervisors as defined in the Act.

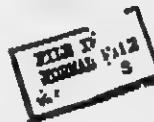
TIME AND PLACE OF ELECTION

DATE: March 16, 1966

TIME: 5:30 p.m. to 6:30 p.m.

PLACE: Lunch Room

EMPLOYEES MAY VOTE WHEN POLLS ARE OPEN



UNITED STATES OF AMERICA
National Labor Relations Board
OFFICIAL SECRET BALLOT

FOR CERTAIN EMPLOYEES OF
ZINK'S FOODS, INC.

SAMPLE
Do you wish to be represented for purposes of collective bargaining by -

RETAIL CLERKS UNION, LOCAL NO. 1401, RETAIL
CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES

☐

NO

☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

ON AND MUST NOT BE DEFACED BY ANYONE

ZIERKE'S FOODS, INC.

Employer

and

RETAIL CLERKS UNION, LOCAL NO. 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION,
AFL-CIO

Petitioner

Case No. 30-82-400

Date issued March 16, 1966

Type of Election:

(Check one):

☐ Consent Agreement☒ Stipulation☐ Board Direction☐ RD Direction(If applicable
check either
or both):☐ 8(b) (7)☐ Mail Ballot

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 25
2. Void ballots 0
3. Votes cast for PETITIONER 10
4. Votes cast for
5. Votes cast for
6. Votes cast against participating labor organization(s) 15
7. Valid votes counted (sum of 3, 4, 5, and 6) 25
8. Challenged ballots 0
9. Valid votes counted plus challenged ballots (sum of 7 and 8) 25
10. Challenges are (not) sufficient in number to effect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (item 9) has (not) been cast for: PETITIONER

FILE IN
IN-146 FILE
8

For the Regional Director

George Stuck

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

Ernest J. Guake

For

For PETITIONER

Paul P. Keller

For

**UNION OBJECTIONS
(COMPANY EXHIBIT 3)**

CLASS OF SERVICE
This is a fast message unless its delivery character is indicated by the proper symbol.

WESTERN UNION
TELEGRAM

W. F. MARSHALL, President

SP-1201 (4-60)

SYMBOLS
DL—Day Letter
NL—Night Letter
LT—International Letter Telegram

The filing time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination.

1052A CST MAR 21 66 MC112

MW M MD8016 PD MADISON WIS 21 1032A CST

ATTORNEYS RUSS MILLER

1966 MAR 21 PM 11 01

720 WELLS BLDG 324 EAST WISCONSIN AVE MILW

RE REPRESENTATION ELECTION RCIA 1401 AND ZINKI'S FOODS INC

30-RC-400

GENTLEMEN: PLEASE BE ADVISED THAT THE UNION OBJECTS TO THE ELECTION CONDUCTED IN THE ABOVE MANNER ON WEDNESDAY MARCH 15. DURING THE COURSE OF THE ELECTION CAMPAIGN THE COMPANY ENGAGED IN A COURSE OF CONDUCT WHICH BOTH COERCED THE EMPLOYEES IN THE EXERCISE OF THEIR FREE CHOICE IN VIOLATION OF SECTION 8A1 AND ADDITIONALLY THIS CONDUCT UPSET THE "LABORATORY CONDITIONS" SURROUNDING THE ELECTION. A DETAILED STATEMENT OF POSITION WILL FOLLOW

DAVID LOEFFLER ATTORNEY FOR 401 RCIA

REC'D MAR 21 1966

**UNION OBJECTIONS
(COMPANY EXHIBIT 4)**

March 24, 1966

Mr. George Squillacote
Regional Director
National Labor Relations Board
744 N. Fourth St.
Milwaukee, Wis.

Re: Case No. 30-RC-400
Zinke's Food Market

Dear Sir:

The union files the following more detailed objections to the election conducted on March 16, 1966:

1. Subsequent to the Board's receipt of the union's representation petition on February 21, 1966 and until March 14, 1966, the employer engaged in a course of conduct designed to harass and intimidate Ed Kallas, an employee and union adherent, because of his union commitment. Moreover, this course of conduct was consciously conducted in the presence of other employees and was designed to serve as an object lesson to other employees, of the consequences that would befall a union adherent.
2. On or about March 12, 1966 and until about March 14, 1966, the employer prohibited any oral pro-union solicitation or campaigning by employees anywhere on company premises at any time, while, alternatively, the company permitted and consciously reinforced oral campaigning by anti-union employees on company premises during working hours.
3. On or about March 12, 1966 and again on March 14, 1966, the company, through its agent, Tom Kozol, threatened employee, Dianne Kay Haime, with loss of employment, for the purpose of dissuading her from a union commitment.

4. On or about March 14, 1966, the employer, through its agent, Tom Kozol, unlawfully interrogated employees, Dianne Kay Haime, and Doris Saladino, about their attitudes toward unionism.

5. On or about March 5, 1966, March 11, 1966, and March 12, 1966, the employer distributed literature which threatened employees with economic reprisal should they vote union, and further identified the union with strikes and violence, and further informed the employees that it would not bargain in good faith with the union even if it were successful in the election.

6. On or about March 12, 1966 and until March 16, 1966, Elenore Lee, company bookkeeper, consciously served as the conduit for employer threats of loss of employment if employees chose unionism. Although an "employee" within the meaning of the statute, in these particular circumstances Mrs. Lee, with the company's conscious purposeful consent, acted as company spokesman and was recognized as the company spokesman by the affected employees.

Each allegation constitutes an independent 8(a)(1) violation. *A fortiori* the laboratory conditions surrounding the election have been upset and the election ought to be set aside.

Very truly yours,

DAVID LOEFFLER

DL-rj

Case No. 30-BC-400

**MOTION TO OVERRULE PETITIONER'S OBJECTIONS
TO CONDUCT AFFECTING THE RESULTS OF ELECTION****MOTION**

Zinke's Foods, Inc., employer herein, by its attorneys, Hoebreckx, Davis & Vergeront, respectfully moves the Regional Director of Region 30, National Labor Relations Board, as follows:

To dismiss the Petitioner's objections to conduct affecting the results of the election, because the objections were not in the form or substance required nor filed within the time permitted by § 102.69, Rules and Regulations, Series 8, as amended.

ARGUMENT

The election in this case was conducted on March 16, 1966. The tally of ballots was furnished to the parties on the date of the election. Section 102.69(a) provides in part as follows:

"Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election, *which shall contain a short statement of the reasons therefor.*"

The objection deadline date in this case was no later than March 23, 1966, since days on which Board offices are not open for business are excluded in determining timeliness of objections to elections. See § 102.114(a), Rules and Regulations, Series 8, as amended; *Lafayette National Bank of Brooklyn*, 77 NLRB No. 195.

The Petitioner, by its attorney, sent a telegram dated March 21, 1966. The body of the telegram read as follows:

"Gentlemen: Please be advised that the union objects to the election conducted in the above matter on Wednesday, March 15. During the course of the election campaign the Company engaged in a course of conduct which both coerced the employees in the exercise of their free choice in violation of Section 8A1 and additionally this conduct upset the 'laboratory conditions' surrounding the election. A detailed statement of position will follow."

The Petitioner then filed more detailed objections by letter dated March 24, 1966 and received by this office on March 28, 1966. These objections, to be timely, must have been received by the Regional Director on the last day of the time limit, i.e., no later than March 23, 1966. § 102.114(b), Rules and Regulations, Series 8, as amended.

The Petitioner's statements contained in the telegram are merely general conclusionary allegations of interference with the election and as such fail to supply the "short statement of reasons therefor" required by the Board rules. *Don Allen Midtown Chevrolet*, 113 NLRB No. 102; *Progressive Brass Foundry Co.*, 114 NLRB No. 149. In both cases the objections first filed were by telegram and were similar in content to those filed in the instant case. The telegram in the *Don Allen* case was as follows:

"PLEASE TAKE NOTICE, that LOCAL 259, UAW, CIO, the petitioner herein, by its attorneys, BOUDIN, COHN AND GLICKSTEIN, hereby objects to the results and conduct of the election held in the above matter on Friday, January 28, 1954, on the ground that the employer, by its representatives and agents, interfered with its employees and prevented them from exercising their free choice in the selection of a collective bargaining representative." 36 LRRM 1461

The telegram in *Progressive Brass* stated as follows:

"We hereby file objection to the conduct of the election and conduct affecting the results of the election in the above named case. Board permitted collusion between company and other union. Bill of particulars

will be filed in a few days. Copy of telegram to company." 37 LRRM 1073

Both statements were found to be insufficient in specific content and substance and were thus dismissed as improper objections. It is clear that the Board construes "short statement of the reasons" to mean that the objections must "be reasonably specific in alleging facts which *prima facie* would warrant setting aside the election." *Don Allen, supra*, 36 LRRM 1461. The objections filed by Petitioner do not meet this fundamental test and therefore cannot be considered on the merits and must be dismissed.

The fact that Petitioner ultimately filed more detailed, untimely objections does not cure the defect requiring dismissal. Petitioner's telegram can be construed only as a notice of intention to file proper objections. Such a notice does not affect the necessity of proper objections being filed within the five-day period and, therefore, Petitioner's March 24, 1966 letter is untimely. *General Electric Co.*, 103 NLRB No. 16; see, *Progressive Brass Foundry Co.*, *supra*.

CONCLUSION

For these reasons, Petitioner's objections are improper and not timely, and must be dismissed.

Dated April 8, 1966.

Respectfully submitted,

HOEBRECKX, DAVIS & VERGERONT

/s/ RUSS R. MUELLER

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Case No. 30-RC-400
Stipulation

ZINKE'S FOODS, INC., *Employer*

and

RETAIL CLERKS UNION, LOCAL NO. 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Petitioner

**REPORT AND RECOMMENDATION ON OBJECTIONS TO
CONDUCT AFFECTING THE RESULTS OF THE ELECTION**

Pursuant to a petition filed on February 21, 1966, by Retail Clerks Union, Local No. 1401, Retail Clerks International Association, AFL-CIO, hereinafter called Petitioner, and a Stipulation for Certification upon Consent Election executed by the parties and approved by the Regional Director on March 4, 1966, an election by secret ballot was conducted under the direction and supervision of the undersigned Regional Director on March 16, 1966, among certain employees of the Employer.¹ The results of the election are set forth in a tally of ballots served on the parties on the date of the election.²

¹The unit agreed to pursuant to the terms of the Stipulation consists of all full-time and regular part-time employees of the Employer at its Beloit, Wisconsin store excluding meat department employees, store manager, office clerical employees, guards and supervisors as defined in the Act.

² Approximate number of eligible voters	25
Void ballots	0
Votes cast for participating labor organization	10
Votes cast against participating labor organization	15
Valid votes counted	25
Challenged ballots	0
Valid votes counted plus challenged ballots	25

On March 21, 1966, the Petitioner filed timely objections to conduct affecting the results of the election, a copy of which was duly served on the Employer.

Acting pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the undersigned has investigated the issues raised by the objections and hereby reports as follows:

THE OBJECTIONS

The objections, filed by telegram, allege as follows:

GENTLEMEN: PLEASE BE ADVISED THAT THE UNION OBJECTS TO THE ELECTION CONDUCTED IN THE ABOVE MANNER [sic] on WEDNESDAY MARCH 15 [sic]. DURING THE COURSE OF THE ELECTION CAMPAIGN THE COMPANY ENGAGED IN A COURSE OF CONDUCT WHICH BOTH COERCED THE EMPLOYEES IN THE EXERCISE OF THEIR FREE CHOICE IN VIOLATION OF SECTION 8A1 AND ADDITIONALLY THIS CONDUCT UPSET THE 'LABORATORY CONDITIONS' SURROUNDING THE ELECTION. A DETAILED STATEMENT OF POSITION WILL FOLLOW.

On March 28, 1966, the Petitioner filed a detailed statement of six objections, a copy of which was duly served on the Employer on that date. The Petitioner's detailed statement of March 28, 1966, alleges in substance as follows:

1. Subsequent to the Board's receipt of the petition on February 21, 1966 and until March 14, 1966, the Employer engaged in a course of conduct designed to harass and intimidate Ed Kallas, an employee and union adherent, because of his union commitment; and especially in the presence of other employees to serve as an object lesson.

2. On or about March 12, 1966 and until about March 14, 1966, the Employer prohibited any oral solicitation by employees anywhere on company premises at any time, while permitting oral campaigning by antiunion employees on company premises during working hours.

3. On or about March 12, 1966 and again on March 14, 1966, the Employer threatened an employee with loss of employment.

4. On or about March 14, 1966, the Employer unlawfully interrogated employees about their attitudes toward unionism.

5. By letters dated March 5, 1966, March 11, 1966 and March 12, 1966, the Employer threatened employees with economic reprisal, identified the Union with strikes and violence, and informed the employees that it would not bargain in good faith with the Union.

6. On or about March 12, 1966 and until March 16, 1966, Eleanor Lee, company bookkeeper, consciously served as the company spokesman for Employer threats of loss of employment, if the employees chose union representation.

On April 11, 1966, the Employer filed a motion with the undersigned, with a copy duly served on the Petitioner, to dismiss the objections on grounds that they were not timely filed and were not in a form or substance required by Section 102.69 of the Board's Rules and Regulations.

THE INVESTIGATION

The Petitioner has supplied, and the investigation reveals evidence tending to show that the Employer, by its agents, has engaged in the acts and conduct alleged as objectionable by the Petitioner in its objections Nos. 1 through 6. The Employer, in substance, denies that it has engaged in any acts or conduct to warrant setting aside the election. The investigation further reveals that the issues raised in the objections are substantially the same as those alleged in a related unfair labor practice charge filed by the Petitioner on April 1, 1966, docketed as Case No. 30-CA-372, upon which a Complaint and Notice of Hearing has been issued.

CONCLUSION AND RECOMMENDATIONS

The investigation reflects that on March 21, 1966, the

Petitioner filed a telegram with the undersigned with a copy duly served on the Employer objecting to the course of conduct engaged in by the Employer during the course of the preelection campaign. The telegram stated that a detailed statement of position with respect to the Petitioner's objections would follow and such detailed statement of position setting forth six specific objections was filed on March 28, 1966, with a copy duly served on the Employer. In view of the filing of the telegram on March 21, 1966, followed by the detailed statement of position of the objections filed on March 28, 1966, both of which were served on the Employer, I find that the objections were timely filed, and contained the necessary form and substance to comply with Section 102.69 of the Board's Rules and Regulations. Furthermore, the investigation of the objections was not initiated until well after the service of the detailed statement of March 28th. In view of this and also of the fact that a hearing to resolve the objections is being recommended herein, it does not appear that the Employer was prejudiced by the manner of the filing of the objections. The Employer's motion to dismiss is accordingly denied.

With respect to the merits, it is apparent from the investigation that the evidence relating to Petitioner's objections Nos. 1 through 6 is attended by substantial issues of credibility. Moreover, the allegations of objectionable conduct are substantially the same as the allegation of unfair labor practices in Case No. 30-CA-372, now scheduled to be heard before a Trial Examiner.

Accordingly, in view of the existence of the credibility issues, which can most expeditiously be resolved by recourse to a hearing, and good cause appearing therefore, it is recommended that such hearing be ordered for the purpose of eliciting evidence on the basis of which the Board may discharge its duties under Section 9(c) of the Act.

It is further recommended that for the purpose of

avoiding undue costs and delay, the above-captioned proceeding be consolidated with Case No. 30-CA-372 for the purposes of hearing, ruling and decision by a Trial Examiner.

Dated at Milwaukee, Wisconsin this 18th day of May 1966.

/s/ GEORGE SQUILLACOTE,
Regional Director
 National Labor Relations Board
 Thirtieth Region
 Suite 230, Commerce Building
 744 North Fourth Street
 Milwaukee, Wisconsin 53203

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 30-BC-400

ZINKE'S FOODS, INC., *Employer*

and

RETAIL CLERKS UNION, LOCAL No. 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Petitioner

ORDER DIRECTING HEARING

On March 16, 1966, pursuant to a Stipulation for Certification upon Consent Election executed by the parties on March 3, 1966, an election by secret ballot was conducted in the above-entitled proceeding, under the direction and supervision of the Regional Director for Region 30 (Milwaukee, Wisconsin). Upon the conclusion of the election, a tally of ballots was furnished the parties in accordance with the Board's Rules and Regulations.

The tally of ballots shows that there were approximately 25 eligible voters and that 25 ballots were cast, of which 10 were for, and 15 were against, the Petitioner.

On March 21, 1966, the Petitioner filed, in the form of a telegram, timely objections to conduct affecting the results of the election, and, on March 28, a detailed statement of position setting forth six objections, both of which were served on the Employer and the Regional Director. On April 11, 1966, the Employer filed with the Regional Director a motion to dismiss the Petitioner's objections on the ground that they were not timely filed and were not in a form or substance required by Section 102.69 of the Board's Rules and Regulations. Thereafter, on May 18, 1966, the

Regional Director issued and served on the parties his Report and Recommendation on Objections to Conduct Affecting the Results of the Election. In his report, the Regional Director found that the Petitioner's filing of objections complied with Section 102.69 of the Board's Rules and Regulations, and denied the Employer's motion. He investigated the issues raised by the objections, and concluded that the evidence relating to them is attended by substantial issues of credibility, and that the allegations of the objectionable conduct are substantially the same as the allegation of unfair labor practices in Case No. 30-CA-372 which is scheduled to be heard before a Trial Examiner. Therefore, he recommended to the Board that a hearing be ordered for the purpose of eliciting evidence on the credibility issues raised by the objections, and that the instant proceeding be consolidated with Case No. 30-CA-372 for the purposes of hearing, ruling, and decision by a Trial Examiner.

No exceptions to the Regional Director's report having been filed by either party within the time provided therefor, the Board hereby adopts the Regional Director's recommendations as contained in his report. Accordingly,

IT IS HEREBY ORDERED that a hearing be held for the purpose of adducing evidence to resolve the issues raised by the Petitioner's objections, and that such hearing may be consolidated with any hearing on the complaint issued in Case No. 30-CA-372, and held before a Trial Examiner to be designated by the Chief Trial Examiner. In the event that the unfair labor practice proceeding is disposed of prior to the hearing, the Regional Director for Region 30 is authorized to designate a Hearing Officer to hear the representation matter.

IT IS FURTHER ORDERED that the Trial Examiner, or the Hearing Officer, designated for the purpose of conducting such hearing, shall prepare and cause to be served on the parties a report containing resolutions of the credibility

of witnesses, findings of fact, and recommendations to the Board as to the disposition of said objections. Within the time prescribed by the Board's Rules and Regulations, any party may file with the Board in Washington, D. C., an original and seven copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on each of the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Trial Examiner, or the Hearing Officer.

IT IS FURTHER ORDERED that the above-entitled matter be, and it hereby is, referred to the Regional Director for Region 30 for the purpose of arranging such hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.

Dated, Washington, D. C., June 2, 1966

By direction of the Board:

JOHN C. TEUESDALE
Associate Executive Secretary

(GENERAL COUNSEL EXHIBIT 1-a)

CHARGE AGAINST EMPLOYER

00

INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.		DO NOT WRITE IN THIS SPACE	
		Case No.	30-CA-372
		Date Filed	April 1, 1966
1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT			
NAME OF EMPLOYER		NUMBER OF WORKERS EMPLOYED	
Zigante's Foods, Inc.		27	
ADDRESS OF ESTABLISHMENT (Street and number, city, zone, and State)		TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.)	
1315 Madison Road Beloit, Wisconsin		Retail Food	
		Identify principal products or service	
		Food stuffs	
The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and 8(a)(5) (unlawful) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.			
2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)			

See attached

2. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Retail Clerks International Association (AFL-CIO) Local 257-4609

301 East Johnson St., Madison, Wis.

257-4609

3. Full Name of National or International Labor Organization of Which It is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

RETAIL CLERKS INTERNATIONAL ASSOCIATION (AFL-CIO)

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

David Loeffler

(Signature of representative of person filing charge)

David Loeffler

March 30, 1966

Attorney for Local 257-4609

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

U.S. GOVERNMENT PRINTING OFFICE: 1962-O-540170

GPO 682-464

1. Subsequent to the union's demand for recognition on February 15, 1966, and until March 14, 1966, the employer engaged in a course of conduct designed to harass and intimidate Ed Kallas, an employee and union adherent, because of his union commitment. Moreover, this course of conduct was consciously conducted in the presence of other employees and was designed to serve as an object lesson to other employees, of the consequences that would befall a union adherent. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

2. On or about March 12, 1966, and until about March 14, 1966, the employer prohibited any oral pro-union solicitation or campaigning of employees anywhere on company premises at any time, while, alternatively, the company permitted and consciously reinforced oral campaigning by anti-union employees on company premises during working hours. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

3. On or about March 12, 1966, and again on March 14, 1966, the company, through its agent, Tom Kozol, threatened employee Dianne Kay Hains with loss of employment for the purpose of dissuading her from a union commitment. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

4. On or about March 14, 1966, the employer through its agent, Tom Kozol, unlawfully interrogated employees, Dianne Kay Hains and Doris Saladino, about their attitudes towards unionism. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

5. On or about March 5, 1966, March 11, 1966, and March 12, 1966, the employer distributed literature which threatened employees with economic reprisal should they vote union, and further identified the union with strikes and violence, and further informed the employees that it would not bargain in good faith with the union even if it were successful in the election. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, in violation of Section 8(a)(1).

6. On or about March 12, 1966, and until March 16, 1966, Elenora Lee, company bookkeeper, consciously served as the conduit for employer threats of loss of employment if employees chose unionism. Although an "employee" within the meaning of the statute, in these particular circumstances Mrs. Lee, with the company's conscious purposeful consent, acted as company spokesman and was recognized as the company spokesman by the affected employees. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, in violation of Section 8(a)(1).

7. On or about February 16, 1966, the employer rejected the union's demand for recognition and bargaining, said demand being predicated upon 18 valid executed authorization cards; the employer did not seek a cross-check of the validity of the signatures, nor did the employer in any manner seek to investigate the validity of the cards. Contemporaneously with the rejection of the demand for recognition, the employer engaged in a course of conduct clearly manifesting his rejection of the collective bargaining principle and his desire to undermine the union's majority status. Because the employer had no good faith reasonable doubt as to the union's majority status and because he pursued a course of conduct calculated to undermine the union's majority status, his entire course of conduct from February 16 to the present constitutes a refusal to bargain in good faith within the meaning of Section 8(a)(5), NLRB.

(GENERAL COUNSEL EXHIBIT 1aa)

CHARGE AGAINST EMPLOYER

FIRST AMENDED CHARGE

INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practices occurred or is occurring.		DO NOT WRITE IN THIS SPACE	
		Case No.	30-CA-372
		Date Filed	April 13, 1966
1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT			
Name of Employer		Number of Workers Employed	
Zinke's Foods, Inc.		27	
Address of Establishment (Street and number, city, zone, and State)		Type of Establishment (Factory, mine, wholesaler, etc.)	
1315 Madison Road Beloit, Wis.		Retail Food	
		Identify principal product or service	
		Food-stuffs	
The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (A), subsections (1) and 8(a) (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.			
2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)			

See attached.

2. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)	
Retail Clerks International Association (AFL-CIO) Local No. 1401	
4. Address (Street and number, city, zone, and State)	Telephone No.
30 East Johnson St., Madison, Wis.	257-6603
3. Full Name of National or International Labor Organization of Which It is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)	
Retail Clerks International Association (AFL-CIO)	

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By David Looffler
 David Looffler
 Attorney for Local 1401

April 11, 1966

(Date)

(Type Name)

WHOLLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SEC. 241)
 U.S. GOVERNMENT PRINTING OFFICE: 1965-0-645770

1. Subsequent to the union's demand for recognition on February 15, 1966, and until March 14, 1966, the employer engaged in a course of conduct designed to harass and intimidate Ed Kallas, an employee and union adherent, because of his union commitment. Moreover, this course of conduct was consciously conducted in the presence of other employees and was designed to serve as an object lesson to other employees, of the consequences that would befall a union adherent. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

2. On or about March 12, 1966, and until about March 14, 1966, the employer prohibited any oral pro-union solicitation or campaigning of employees anywhere on company premises at any time, while, alternatively, the company permitted and consciously reinforced oral campaigning by anti-union employees on company premises during working hours. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

3. On or about March 12, 1966, and again on March 14, 1966, the company, through its agent, Tom Korol, threatened employee Dianne Kay Haine with loss of employment for the purpose of dissuading her from a union commitment. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

4. On or about March 14, 1966, the employer, through its agent, Tom Korol, unlawfully interrogated employees, Dianne Kay Haine and Doris Saladino, about their attitudes toward unionism. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

5. On or about March 5, 1966, March 11, 1966, and March 12, 1966, the employer distributed literature which threatened employees with economic reprisal should they vote union, and further identified the union with strikes and violence, and further informed the employees that it would not bargain in good faith with the union even if it were successful in the election. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, in violation of Section 8(a)(1).

6. On or about March 12, 1966, and until March 16, 1966, Elanore Lee, company bookkeeper, consciously served as the conduit for employer threats of loss of employment if employees chose unionism. Although an "employee" within the meaning of the statute, in these particular circumstances Mrs. Lee, with the company's conscious purposeful consent, acted as company spokesman and was recognized as the company spokesman by the affected employees. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, in violation of Section 8(a)(1).

(GENERAL COUNSEL EXHIBIT 1aa)

CHARGE AGAINST EMPLOYER

FIRST AMENDED CHARGE

INSTRUCTIONS: File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.		DO NOT WRITE IN THESE SPACES	
		Case No.	30-CA-372
		Date Filed	April 13, 1966
1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT			
NAME OF EMPLOYER		NUMBER OF WORKERS EMPLOYED	
Zinke's Foods, Inc.		27	
ADDRESS OF ESTABLISHMENT (Street and number, city, zone, and State)		TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.)	
1315 Madison Road Beloit, Wis.		Retail Food	
		Identify principal product or service	
		Food-stuffs	
The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and <u>8(a)(5)</u> of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.			
2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)			

See attached.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)	
Retail Clerks International Association (AFL-CIO) Local No. 1401	
4. Address (Street and number, city, zone, and State)	Telephone No.
30 East Johnson St., Madison, Wis.	257-4603
5. Full Name of National or International Labor Organization of Which It is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)	
Retail Clerks International Association (AFL-CIO)	

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By David Loeffler
 David Loeffler
 Attorney for Local 1401

April 11, 1966

(Type, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
 U.S. GOVERNMENT PRINTING OFFICE: 1960-O-544776

1. Subsequent to the union's demand for recognition on February 15, 1966, and until March 14, 1966, the employer engaged in a course of conduct designed to harass and intimidate Ed Kallas, an employee and union adherent, because of his union commitment. Moreover, this course of conduct was consciously conducted in the presence of other employees and was designed to serve as an object lesson to other employees, of the consequences that would befall a union adherent. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

2. On or about March 12, 1966, and until about March 14, 1966, the employer prohibited any oral pro-union solicitation or campaigning of employees anywhere on company premises at any time, while, alternatively, the company permitted and consciously reinforced oral campaigning by anti-union employees on company premises during working hours. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

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4. On or about March 14, 1966, the employer, through its agent, Tom Kozol, unlawfully interrogated employees, Dianne Kay Haine and Doris Saladino, about their attitudes toward unionism. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, all in violation of Section 8(a)(1).

5. On or about March 5, 1966, March 11, 1966, and March 12, 1966, the employer distributed literature which threatened employees with economic reprisal should they vote union, and further identified the union with strikes and violence, and further informed the employees that it would not bargain in good faith with the union even if it were successful in the election. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, in violation of Section 8(a)(1).

6. On or about March 12, 1966, and until March 16, 1966, Elenore Lee, company bookkeeper, consciously served as the conduit for employer threats of loss of employment if employees chose unionism. Although an "employee" within the meaning of the statute, in these particular circumstances Mrs. Lee, with the company's conscious purposeful consent, acted as company spokesman and was recognized as the company spokesman by the affected employees. By this and other conduct the employer interfered with rights protected by Section 7, NLRA, in violation of Section 8(a)(1).

7. On or about February 16, 1966, the employer rejected the union's demand for recognition and bargaining, said demand being predicated upon 18 valid executed authorization cards; the employer did not seek a cross-check of the validity of the signatures, nor did the employer in any manner seek to investigate the validity of the cards. Contemporaneously with the rejection of the demand for recognition, the employer engaged in a course of conduct clearly manifesting his rejection of the collective bargaining principle and his desire to undermine the union's majority status. Because the employer had no good faith reasonable doubt as to the union's majority status and because he pursued a course of conduct calculated to undermine the union's majority status, his entire course of conduct from February 16 to the present constitutes a refusal to bargain in good faith within the meaning of Section 8(a)(5), NLRB.

8. From on or about February 15, 1966, until on or about April 8, 1966, the employer systematically harassed and intimidated employee Ed Kallas because of his union commitment for the purpose of creating a work atmosphere so intolerable that Kallas would be forced to terminate his employment to preserve his physical and psychological health. Given the company's course of conduct and its motivation, Kallas's termination of employment on or about April 8, 1966, was a constructive discharge for union activity within the meaning of Section 8(a)(3).

By this and other conduct the employer interfered with rights secured by Section 7, NLRB, all in violation of Section 8(a)(1).

(GENERAL COUNSEL EXHIBIT 1-c)

Case No. 30-CA-372

ZINKE'S FOODS, INC.

and

RETAIL CLERKS UNION, LOCAL NO. 1401,

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

COMPLAINT AND NOTICE OF HEARING

It having been charged by Retail Clerks Union, Local No. 1401, Retail Clerks International Association, AFL-CIO, herein called the Union, that Zinke's Foods, Inc., herein called Respondent, has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Thirtieth Region, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. (a) The original charge herein was filed by the Union on April 1, 1966, and was served on Respondent, by registered mail, on the same date.

(b) The first amended charge herein was filed by the Union on April 13, 1966, and was served on Respondent by registered mail on the same date.

2. (a) Respondent, a Wisconsin corporation, is engaged in the retail sale of grocery and related products with its

timely objections to conduct affecting the result of the principal office and store at Wisconsin Dells, Wisconsin, and one store located at Beloit, Wisconsin, which is the only store involved in this proceeding.

(b) During the past year, a representative period, Respondent had gross sales in excess of \$500,000, and during the same period, Respondent purchased and received products and materials valued in excess of \$50,000 from firms located within the State of Wisconsin which had received the said products and materials, in interstate commerce, directly from points outside the said State.

(c) At all times material herein, Respondent is and has been an "employer" as defined in Section 2(2) of the Act, engaged in "commerce" and in operations "affecting commerce" as defined in Section 2(6) and (7) of the Act, respectively.

3. At all times material herein the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

4. At all times material herein, Thomas J. Kozol occupied the position of store manager and has been and is now an agent of the Respondent acting on its behalf and is a supervisor within the meaning of Section 2(11) of the Act.

5. On or about the dates indicated below, the Respondent, at its said store unless otherwise indicated, interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, by:

(a) On or about March 5, 1966, March 11, 1966, and March 12, 1966, in sending letters to employees threatening loss of employment, associating union representation with industrial dissension and strikes, and threatening that union representation would be a futile gesture leading to a strike by the employees.

(b) The conduct of Kozol on or about February 19,

1966, in interrogating an employee concerning his union activity and desires, and threatening that the store would close if the employees chose to be represented by the Union.

(c) The conduct of Kozol on or about February 23, 1966, in threatening to discharge an employee known to be a leading union adherent.

(d) The conduct of Kozol on or about March 11, 1966, in threatening employees with reduction in hours and/or loss of employment if the Union became the employees' bargaining representative.

(e) The conduct of Kozol on or about March 12, 1966, in ordering an employee not to discuss the Union at any time on Respondent's premises.

(f) The conduct of Kozol on or about March 12, 1966, March 14, 1966, and March 15, 1966, in meeting individually with employees for the purpose of having them reject the Union, and threatening them with reduction in hours and/or loss of employment if the Union became the employees' bargaining representative.

6. On or about the dates set forth below, Respondent discriminated against employee, Edward Kallas, Jr., because of his membership in and activity on behalf of the Union, by:

(a) The conduct of Kozol on or about March 11, 1966, in making physically threatening gestures toward Kallas.

(b) The conduct of Kozol on or about March 11, 1966, and March 12, 1966, in discriminating against Kallas regarding break time and off-duty time.

(c) The conduct of Kozol from on or about February 15, 1966, in making the working conditions of Kallas, so onerous, burdensome, and intolerable that he was forced to quit his employment on April 7, 1966.

7. All regular full-time and regular part-time employees

of the Respondent at its Beloit, Wisconsin, store; excluding meat department employees, stores manager, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining.

8. At all times since February 14, 1966, the Union has been designated or selected by a majority of Respondent's employees, in the unit described in paragraph 7 above, as their exclusive collective-bargaining representative for the purpose of bargaining with Respondent with respect to rates of pay, wages, hours, and other terms and conditions of employment.

9. On or about February 14, 1966, the Union requested Respondent to bargain collectively in good faith with respect to wages, hours and other terms and conditions of employment of the employees in the unit described in paragraph 7 above.

10. At all times since on or about February 15, 1966, Respondent has refused and continues to refuse to bargain in good faith with the Union and has instead engaged in a course of conduct designed to undermine and destroy the Union's status as collective bargaining representative, by:

(a) Engaging in the acts and conduct described in paragraphs 5 and 6 above in order to induce employees to repudiate the Union.

(b) Failing and refusing to recognize and bargain with the Union, without any reasonable basis for doubting the Union's status as bargaining representative of a majority of Respondent's employees in the unit described in paragraph 7 above.

11. By the acts and conduct alleged above, the Respondent has engaged in, and is engaging in, unfair labor practices, as defined in Section 8(a)(1), (3) and (5) of the Act, affecting "commerce" as defined in Section 2(6) of the Act.

PLEASE TAKE NOTICE that on the 6th day of July 1966, at 10 a.m. CDST, in Room 302 Municipal Center, 220 West Grand Avenue, Beloit, Wisconsin, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, the Respondent shall file with the undersigned Regional Director, acting in this matter as an agent of the National Labor Relations Board, an original and four copies of an Answer to said Complaint within 10 days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be true and shall be so found by the Board. You are also notified that pursuant to said Rules and Regulations, Respondent shall serve a copy of the Answer on each of the other parties.

Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

Dated at Milwaukee, Wisconsin this 16th day of May 1966.

/s/ GEORGE SQUILLACOTE,
Regional Director
National Labor Relations Board
Thirtieth Region
Suite 230, Commerce Building
744 North Fourth Street
Milwaukee, Wisconsin 53203

(GENERAL COUNSEL EXHIBIT 1-e)

Case No. 30-CA-372

ANSWER

Respondent, Zinke's Foods, Inc., by its attorneys, Hoebreckx, Davis & Vergeront, answering the Complaint filed herein, admits, denies, and alleges as follows, to-wit:

1. Admits the allegations of paragraphs 1, 2, 3, and 4 of the Complaint.

2. Denies the allegations of paragraphs 5 and 6 of the Complaint.

3. Admits the allegations of paragraph 7 of the Complaint.

4. Denies the allegations of paragraph 8 of the Complaint.

5. Answering paragraph 9, admits that on or about February 14, 1966, the Union requested Respondent to negotiate, but denies that the said request was for the unit described in paragraph 7 of the Complaint; alleges that the said request to negotiate was for an inappropriate unit; and further answering paragraph 9 of the Complaint, Respondent alleges that on February 21, 1966, the Union filed a Petition for Certification with the National Labor Relations Board and that pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on March 16, 1966, in which a majority of employees voted against representation by said Union in the unit as described in paragraph 7 of the Complaint.

6. Answering paragraph 10, admits that since on or about February 15, 1966, Respondent has refused, and continues to refuse, to bargain with the Union; alleges that

Respondent had no obligation to recognize and bargain with the Union; and denies that Respondent engaged in a course of conduct designed to undermine or destroy the Union's status as collective bargaining representative.

7. Denies the allegations in paragraph 11 of the Complaint.

Further answering paragraph 11 of the Complaint, Respondent alleges that employee Edward Kallas, Jr. was offered reinstatement to his former job as produce department head by letter of May 12, 1966, employee Kallas informed Respondent on May 14, 1966 of his rejection of this offer, and, thus, the alleged violation of § 8(a)(3) of the Act in paragraph 11 is moot.

Further answering paragraph 11 of the Complaint, Respondent alleges that the Union did not file sufficient and timely objections to conduct affecting the result of the election, and, thus, the question of employee representation by the Union has been determined by the results of the election held on March 16, 1966 and is moot.

Further answering said Complaint, Respondent denies each and every allegation as contained therein, except as expressly admitted in this Answer.

WHEREFORE, Respondent demands that the Complaint herein be dismissed.

Respectfully submitted,

HOEBRECKX, DAVIS & VERGERONT

/s/ RUSS R. MUELLER

(GENERAL COUNSEL EXHIBIT 1-j)

Case No. 30-RC-400

**ORDER CONSOLIDATING CASES AND NOTICE OF
HEARING**

Pursuant to the Order of the Board issued June 2, 1966, in the above case, it is hereby,

ORDERED, that said case be and it hereby is consolidated with Case No. 30-CA-372 in which complaint was issued on May 16, 1966, and

THE PARTIES ARE HEREBY NOTIFIED that on the 6th day of July 1966, at 10 a.m. (C.D.S.T.) in Room 302 Municipal Center, 220 West Grand Avenue, Beloit, Wisconsin, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations of said complaint, and on the issues raised by the Petitioner's objections to conduct affecting the results of the election in Case No. 30-RC-400, at which time and place you may appear in person, or otherwise, and give testimony.

Issued at Milwaukee, Wisconsin this 6th day of June 1966.

/s/ GEORGE SQUILLACOTE,
Regional Director
National Labor Relations Board
Thirtieth Region
Suite 230, Commerce Building
744 North Fourth Street
Milwaukee, Wisconsin 53203

(GENERAL COUNSEL EXHIBIT 2)

AMENDMENT TO COMPLAINT

The General Counsel, upon authorization of the Trial Examiner granted at the hearing herein in the above-captioned cases, moves to amend the complaint in the following respects:

Amend paragraph 10 by adding sub-paragraph (c) as follows:

(c) Unilaterally changing the wages of its employees without bargaining with the Union concerning either the decision to make such changes, the making of such changes, or the effect of such changes on the employees in the unit.

(COMPANY EXHIBIT 1)

AMENDED AND SUPPLEMENTAL ANSWER

Respondent, Zinke's Foods, Inc., by its attorneys, Hoebreckx, Davis & Vergeront, for its amended and supplemental answer to the complaint filed herein, admits, denies, and alleges as follows, to-wit:

1. Admits the allegations of paragraphs 1, 2, 3, 4, 5, subparagraphs (b) to (f), and 7 of the complaint.

2. Denies the allegations of paragraph 5, subparagraph (a) of the complaint.

3. Answering paragraph 6 of the complaint, denies each and every allegation thereof, and alleges that in all events upon the filing of a charge of violation of § 8(a)(3) of the Act in respect to Kallas, Respondent in an effort to compromise, offered said Kallas full reinstatement by letter of May 12, 1966, which he refused on May 14, 1966, and paid him \$41.28 in back pay indemnity; that Kallas accepted the indemnity; and that the alleged violations asserted in paragraph 6 have, thus, become moot.

4. Denies the allegations of paragraph 8 of the complaint.

5. Answering paragraph 9 of the complaint, admits that on or about February 14, 1966, the Union requested Respondent to negotiate, but denies that the said request was for the unit described in paragraph 7 of the complaint; and further answering paragraph 9 of the complaint, Respondent alleges that on February 21, 1966, the Union filed a Petition for Certification with the National Labor Relations Board, and that pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on March 16, 1966, in which a majority of employees voted against representation by said Union in the unit as described in paragraph 7 of the complaint.

6. Answering paragraph 10, admits that since on or about February 15, 1966, Respondent has refused, and con-

tinues to refuse, to bargain with the Union; alleges that Respondent has never been obligated to recognize and bargain with the Union; and denies that Respondent engaged in a course of conduct designed to undermine or destroy the Union's status as collective bargaining representative.

7. Except as hereinabove expressly admitted, denies the allegations of paragraph 11 of the complaint.

Further answering the complaint, Respondent alleges that the Union did not file sufficient and timely objections to conduct affecting the results of the election, and, thus, the question of employee representation by the Union has been determined by the results of the said election held on March 16, 1966, which results cannot now be set aside, nor a bargaining order be directed.

Further answering said complaint, Respondent denies each and every other allegation as contained therein, except as expressly admitted in this answer.

Dated July 5, 1966.

Respectfully submitted,

HOEBRECKX, DAVIS & VERGERONT

/s/ RUSS R. MUELLER

Attorneys for Respondent

(COMPANY EXHIBIT 2)
SECOND AMENDED ANSWER

Respondent, Zinke's Foods, Inc., by its attorneys, Hoebreckx, Davis & Vergeront, answering the Amended Complaint filed herein, denies the allegations of paragraph 10, subparagraph (c).

Dated July 6, 1966.

Respectfully submitted,

HOEBRECKX, DAVIS & VERGERONT

/s/ RUSS R. MUELLER

Attorneys for Respondent

BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

Case Nos. 30-RC-400, 30-CA-372

In the Matter of:
ZINKE'S FOODS, INC.

AND

RETAIL CLERKS UNION, LOCAL NO. 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Room 302
Municipal Center, Beloit, Wisconsin
Wednesday, July 6, 1966

The above-entitled matter came on for hearing, pursuant to notice, at 10:15 o'clock a.m.

BEFORE:

JOSEPHINE H. KLEIN, *Trial Examiner*

APPEARANCES:

DENNIS M. SELBY, *Esq.*, 744 North Fourth Street, Milwaukee, Wisconsin, on behalf of General Counsel
DAVID LOEFFLER, *Esq.*, Lawton & Cates, 119 Monana Ave., Madison, Wisconsin, on behalf of Charging Party
RUSS R. MUELLER, *Esq.*, Hoebreckx, Davis and Vergeront, 324 East Wisconsin Avenue, Milwaukee, Wisconsin, on behalf of Respondent

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PROCEEDINGS

Trial Examiner Klein: The hearing will be in order.
This is a formal hearing before the National Labor

Relations Board in the matter of Zinke's Foods, Incorporated, case number 30-CA-372 consolidated with case number 30-RC-400, the objections to the election. The Trial Examiner conducting this hearing is Josephine H. Klein. All parties know the rules to be followed and have been served with the statements of procedure. Additional copies are available if you want them.

Now, will counsel please state their appearances for the record?

Mr. Selby: For the General Counsel, Dennis M. Selby, 744 North Fourth Street, Milwaukee, Wisconsin, 30th Region, National Labor Relations Board.

Mr. Loeffler: For the Charging Party, Lawton and Cates by David Loeffler, 119 Monona Avenue, Madison, Wisconsin.

Trial Examiner: For the Respondent?

Mr. Mueller: For the Respondent, Hoebreckx, H-o-e-b-r-e-c-k-x, Davis and Vergeront, V-e-r-g-e-r-o-n-t, 324 E. Wisconsin Avenue, Milwaukee, Wisconsin, by Russ R. Mueller, M-u-e-l-l-e-r.

Trial Examiner: Gentlemen, before the hearing I gave you an opportunity to talk settlement. I'm going to give you that opportunity again at least twice during the hearing; once at the end of General Counsel's case and once again at the close of the hearing. I don't want anybody
4 to feel inhibited, if at anytime anybody thinks that there would be something to be gained by recess for the purpose of talking settlement, a reasonable recess will be granted at anytime for that purpose.

Now, before we start with the testimony have you any suggestions or any requests as to the method of proceeding? I would assume since both the Complaint and the "R" cases are here together that there's an overlap.

Mr. Selby: Yes ma'am, that's right.

Trial Examiner: Do you, Mr. Loeffler, intend to put witnesses on on your own, or are you going to stand by the General Counsel's witnesses alone?

Mr. Loeffler: It's difficult to answer that. Since the objections are quite the same as the Complaint, for the most part we will rely on General Counsel's witnesses. There's one objection that's not translated into a charge and we'll call witnesses on that. As far as—well, the only one other area where our case will go beyond the complaint is in terms of remedy. In addition to seeking the bargaining order remedy, we would also like to make an argument and offer evidence on a remedy which we think is compensatory and within 10(c) and we would call Mr. Moreth to give certain economic data in support of our argument on the remedy. But, other than that, I would think that our cases would be one and one. All I would do is perhaps examine witnesses of General Counsel in different areas, but I have no witnesses in addition with the exception
5 of perhaps one person.

Trial Examiner: Then I would suggest at this time that the procedure would be for the General Counsel to present his witnesses, he will examine first, then Mr. Loeffler can examine and then Respondent will examine. At the end of the General Counsel's case, Mr. Loeffler, then you will put on an additional witness or witnesses if you want at that time. Is that understood?

Mr. Mueller, I assume at some time you are going to renew the motion to dismiss the objections as untimely?

Mr. Mueller: Your assumption is correct, yes.

Trial Examiner: I will, of course, deny that, and would at this time suggest that—I assume you'll file it after the case, in brief—and particularly, or in addition to anything else that you might want, you might address yourself to my jurisdiction to consider that, the timeliness.

Mr. Mueller: I understand.

Trial Examiner: And additionally you might also consider the Board's jurisdiction since no review was sought of the original Regional Director's decision. I'm just suggesting those as issues you might want to cover at the end.

Mr. Mueller: You want that motion made now?

Trial Examiner: As a preliminary matter, why don't we get it made and denied.

6 Mr. Selby: Excuse me, we don't have the formal documents in yet.

Trial Examiner: You're quite right. Let's reserve that for a moment and get the formal documents in.

Mr. Selby: At this time I'd like to introduce the formal documents, being General Counsel's Exhibits 1(a) through 1(l), 1(f) is an index and description of formal documents in 30-CA-372 and 1(l) is an index and description of formal documents in case number 30-RC-400. The documents, however, are numbered and lettered consecutively. Copies of the formal documents have been shown to all parties.

Mr. Mueller: Can I see the documents in the CA case?

Respondent has no objection to the receipt in evidence of the formal documents.

Trial Examiner: They will be received.

(General Counsel's Exhibit 1(a) through 1(l) was received in evidence.)

Mr. Mueller: At this time, Miss Examiner, Respondent would move for your permission to file and submit in evidence an Amended and Supplemental Answer to the pleadings which I suppose we could mark as Respondent's Exhibit 1 or at your choice.

Trial Examiner: I think it doesn't matter, really, but for convenience sake, let's mark it Respondent's Exhibit 1. Have General Counsel and Charging Party been advised of this in advance?

7 (The above-mentioned document was marked for identification as Respondent's Exhibit 1.)

Mr. Selby: We have not, Miss Examiner. We request time to look at this Answer, Amended Answer. This comes as a complete surprise to us.

Trial Examiner: Mr. Mueller, would you tell us briefly what the proposed amendment is?

Mr. Mueller: You're going to have to compare it to the original Answer that we filed. It makes several additional admissions which will curtail the length of this hearing and picks up other portions of the other Answer that will frame the issues.

Trial Examiner: The amendment has, of course, not been allowed yet. We'll now call a brief recess while counsel examine it.

(A short recess was taken.)

Trial Examiner: On the record. Mr. Selby, do you have any objection to the amendment?

Mr. Selby: Miss Trial Examiner, not the amendment in toto, but there are certain statements made in the Amended Answer that the General Counsel objects to. One of them is paragraph 6 of the Answer which really doesn't belong in an Answer. We're not litigating anything with respect to remedy at this hearing. This is a matter for compliance, if there is a violation of the Act.

8 Mr. Mueller: Paragraph 6 you're speaking of?

Mr. Selby: Paragraph 3.

Trial Examiner: Oh, paragraph 3 of the Answer?

Mr. Selby: Paragraph 3. And we are further alleging with respect to paragraph 3 that while the 8-3 itself may be moot, its applicability to the issues in the case in hearing is not moot and the circumstances surrounding what

we allege is a constructive discharge of Edward Kallas are imperative in proving our case. The important objection we have is that this is pleading remedy which has no bearing on the present issues of the case.

With respect to paragraph 5, most of the matters related in paragraph 5 are formal documents in the "R" case, RC-400, so I see no reason for reciting those facts which are already formal documents. That's the basis for our objection.

We object to paragraph 3 and everything but the first several phrases, quote, "Answering paragraph 9 of the Complaint, admits that on or about February 14, 1966, the union requested Respondent to negotiate", unquote. That portion we would not object to, but we would object to the remainder of paragraph 5.

Trial Examiner: Mr. Loeffler, do you have any objections to the Amendment?

Mr. Loeffler: I would simply repeat General Counsel's objections.

Mr. Mueller: My only comment is that the objections 9 really go to the substance of our position, our Answer.

Trial Examiner: I don't mean to interrupt you, Mr. Mueller, but I'm going to allow the Amendment. I just wanted to be sure you weren't taken by surprise, that there's nothing in here that would be unfair to you, and I think the pleading is satisfactory as a statement of position and it is accepted and the amendment is allowed.

(Respondent's Exhibit 1 was received in evidence.)

Mr. Selby: It will remain the General Counsel's position through this hearing that the Respondent is not allowed to go into any matters relating to remedy or settlement discussions which have gone on prior to this case.

Trial Examiner: I understand that, Mr. Selby, and will

meet that if the problem arises. But, as a pleading I think this is all right, and I may add, I don't read this necessarily as pleading remedy. It seems to me really to be pleading facts and facts on which the defense of mootness is raised. In any event, are there any other preliminary matters?

Mr. Mueller: I have one further matter, and that goes to the filing of our original Answer which has just been amended. An examination of the formal documents which is already received in evidence will reveal that it's not dated. However, it is stamped "recorded", but nowhere does there appear a date. I would like to establish on 10 the record when it was filed with the Board. This is a matter I'm sure we can stipulate to because it's part of the record of General Counsel. We transmitted the Answer by mail on May 27, 1966, and I would assume it was received in your office—oh, excuse me. All right. General Counsel just pointed out to me that on the back of the first page of the Answer the time stamp of the NLRB, 30th Region, indicates that it was filed on May 31 and 9:23.

Trial Examiner: All right, that's taken care of. Any other preliminary matters?

Mr. Selby: Are you including in those preliminary matters any amendments General Counsel may have to the Complaint or stipulations?

Trial Examiner: Yes, if you have any.

Mr. Selby: All right. General Counsel at this time moves to amend the Complaint in the following respect, and I quote, amend paragraph 10 of the Complaint by addition of sub paragraph (c), as follows: "(c) Unilaterally changing the wages of its employees without bargaining with the union concerning either the decisions to make such changes, the making of such changes, or the effect of such changes on the employees in the unit."

The fact General Counsel was going to amend the Com-

plaint in this respect was made known to Respondent's attorney last week.

Mr. Mueller: As will become evident by the fact I have already prepared an Answer.

11 Trial Examiner: The right to amend the Complaint is granted.

(General Counsel's Exhibit 2 for identification was received into evidence.)

Now, I understand we have an amendment to the Answer?

Mr. Mueller: Yes, I have an amendment, a Second Amended Answer which is Respondent's Exhibit Number 2.

Mr. Mueller: It's understood that we're calling these exhibits, but they're pleadings. The second Amended Answer is admitted.

(Respondent's Exhibit 2 for identification was received in evidence.)

Mr. Selby: For the purpose of clarity, I think we should give General Counsel's Exhibit reflecting the amendment to the Complaint a number. Two. General Counsel's Exhibit 2.

Miss Trial Examiner, at this time I would like to offer into evidence stipulations and attached exhibits to those stipulations which have been executed by all parties.

The first exhibit will be General Counsel's Exhibits for identification 3A, 3B, and 3C, being letters dated March 5, 11, and 12, 1966, addressed to all Zinke's Food Market employees.

Mr. Mueller: What were the dates of those again?

Mr. Selby: Five, eleven, and twelve of March. And the stipulation itself being GC Exhibit 4 which refers to and should be attached to GC Exhibits 3A, B, and C. And there should be an amendment to that stipulation, the last

12 paragraph, indicating that the letters referred to, GC Exhibits 3A, B, and C, were sent to all employees of Zinke's except those employed in the meat department.

Mr. Mueller: We can list those who were employed, it's just a matter of——

Mr. Selby: I don't think it's necessary.

Trial Examiner: Off the record for a moment.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Mueller: The amendment to that stipulation which is GC Exhibit 4 is acceptable to the Respondent. It's understood that you amended it to say that it was mailed to all unit employees.

Mr. Selby: Actually I indicated it was amended to read it was mailed to all employees but the meat department employees. Is that acceptable to you, Mr. Mueller?

Mr. Mueller: Or——

Mr. Selby: Not "or".

Mr. Mueller: Or all unit employees.

Mr. Selby: We indicated it was mailed to all employees but the meat department employees, which is what you indicated to me earlier.

Mr. Mueller: Yes, that's acceptable.

Trial Examiner: The exhibits are received.

(General Counsel's Exhibits 3A, 3B, 3C, and 4 for identification were received in evidence.)

13 Mr. Selby: At this time General Counsel wishes to introduce into evidence GC Exhibit 5, a stipulation between all of the parties with respect to the signature on the authorization card of Leonard Buroker, an employee

of Zinke's Foods, and we would offer that as GC Exhibit 5. We would offer the card as GC Exhibit 6.

Mr. Mueller: Respondent has no objection.

Trial Examiner: They'll be received.

(General Counsel's Exhibits 5 and 6 for identification were received in evidence.)

Mr. Selby: At this time the General Counsel calls for the documents subpoenaed from Mr. Thomas Kozel.

Mr. Mueller: Of the record, please.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Mueller: Respondent would object to the relevancy and the scope of Item 1 which appears in the attachment to the subpoena duces tecum. General Counsel requests the names, the dates of hire, lay off or discharge, classification or position, titles, wages, at the Employer's Beloit, Wisconsin store for the period December 1965 to the present date. Respondent contends that such a request is beyond the scope of the pleadings.

Trial Examiner: When was the subpoena served?

Mr. Mueller: It was received June 27 in our office. I would guess General Counsel would know when it was served.

14 Trial Examiner: Mr. Mueller, have you spoken to General Counsel about your objection to the subpoena before now?

Mr. Mueller: Now, I didn't. We have no objection to working out a stipulation as to the employees that were in the unit on the critical dates, but I don't believe it's relevant to have the employees in the unit continuously

from December 1965 to the present day, and it would be a very simple matter to work out such a stipulation.

Mr. Selby: Miss Trial Examiner, we have no objection whatsoever to sitting down and trying to work out a stipulation with respect to who was employed by the Employer on the demand date.

Trial Examiner: All right. I will call a short recess now for you to work out that stipulation. Hopefully, we will then have no problems about the subpoena as such.

Mr. Selby: Excuse me, but before we go off the record, there are certain matters we will insist be presented. Now, this does not relate to everything that we have subpoenaed. We are talking about who was employed. We're not talking about the other information we're requesting. Wages, for one, in particular.

Trial Examiner: Mr. Mueller, have you provided everything else asked for in the subpoena?

Mr. Mueller: Nothing has been provided but we have the information from which it can.

15 Trial Examiner: Are you prepared to give everything but this one objection you're raising now as to who was employed at certain times?

Mr. Mueller: And since Mr. Selby raises this further point as to wages, I would like to know the underlying reason or at what times he wants the wages. If he wants them from December to the present or if he wants them at a certain period of time.

Mr. Selby: Well, I think the subpoena's clear.

Trial Examiner: Do you think you can get together on that?

Mr. Selby: Sure.

Trial Examiner: All right, there will be a short recess

for five minutes. If you need more time, let me know and we'll arrange something.

(A short recess was taken.)

Trial Examiner: The hearing is resumed.

Mr. Mueller: While off the record counsel for the parties to this proceeding worked out a couple of stipulations respecting the information sought in the subpoena duces tecum. The first stipulation relates to the employees employed by the Respondent in the appropriate unit in this proceeding on the demand date by the union, February 14, 1966. I'll read those employees that it has been stipulated to are in the appropriate unit. General Counsel is indicating that this appropriate unit excludes the meat department. Well, that's already established as part 16 of this hearing because it's admitted in our Supplemental Answer.

Trial Examiner: Now, Mr. Mueller, if I could interrupt for a question, as I read the pleadings, there's a unit described and the Respondent agrees that that is the appropriate unit.

Mr. Mueller: That's correct.

Trial Examiner: But says that the union demanded to represent a different unit. Now, can you explain to me just what the difference is? I think I would understand this a lot better.

Mr. Mueller: Well, also under subpoena was the original letter of demand dated February 14, and I think the answer to your question will be cleared up if I just introduce the letter either as a General Counsel's exhibit or our own.

Trial Examiner: I didn't mean to make you present your cases out of order, but I did want to see just what the difference was.

Mr. Mueller: You subpoenaed it, why don't I mark it as your exhibit?

Mr. Selby: It makes no difference to me. It's going to go in evidence one way or another.

Trial Examiner: Why don't you put it in as a joint exhibit?

Mr. Mueller: All right. Mark this as Joint Exhibit 1.

(The above-mentioned document was marked for identification as Joint Exhibit Number 1.)

17 Mr. Mueller: Let the record show that all parties have agreed that submitted as Joint Exhibit Number 1 are xerox copies and the original is being withdrawn with the permission of the Trial Examiner to be retained in our files.

Trial Examiner: Joint Exhibit 1 is received.

(Joint Exhibit 1 for identification was received in evidence.)

Mr. Mueller: Miss Examiner, if you will refer then to the Joint Exhibit 1 and paragraph 7 which we've admitted as an appropriate unit, you will see that the units are not the same, and we can't admit that the requested unit is the same as the alleged unit if they're not the same.

Trial Examiner: As I say, I still don't—is the bone of contention the office clerical workers?

Mr. Mueller: Pardon?

Trial Examiner: Is the bone of contention the office clerical workers?

Mr. Mueller: Janitors.

Trial Examiner: What?

Mr. Mueller: Janitors.

Trial Examiner: This says excluding janitors.

Mr. Mueller: If you read paragraph number 7, it says, "all regular full time and all regular part time employees of

the Employer at its Beloit, Wisconsin, store, excluding meat department employees, store manager, office clerical employees, guards and supervisors as defined in the 18 Act." If you read the unit that was requested recognition within it reads differently because of janitors.

Trial Examiner: I see, the janitors.

Mr. Mueller: Right.

Trial Examiner: Well, I was just trying to find what the substantive difference was of importance here. Now, I apologize again for interrupting you and let's go on with the stipulations.

Mr. Mueller: That's quite all right.

We're back to the stipulation which I'll start over on, and that is, the employees employed within the appropriate unit in this case on the demand date of February 14, 1966: Richard Barreau, B-a-r-r-e-a-u, Albert Bennett, B-e-n-n-e-t-t,—

Mr. Selby: Excuse me one minute, I'm sorry, can we go off the record for one moment?

Trial Examiner: Yes. Off the record.

(Discussion off the record.)

Mr. Mueller: Number 3, Richard Breeden, B-r-e-e-d-e-n, Audrey Bunker, B-u-n-k-e-r, Leonard Buroker, B-u-r-o-k-e-r, Pauline Campbell, C-a-m-p-b-e-l-l, Nancy Fick, F-i-c-k, Diane Haime, H-a-i-m-e, William Hamblin, H-a-m-b-l-i-n, Harry Hamilton, H-a-m-i-l-t-o-n, Thomas Horner, H-o-r-n-e-r, Don Ingham, I-n-g-h-a-m, Edward Kallas, K-a-l-l-a-s, Diane Kaiser, K-a-i-s-e-r, Harvey Larsen, L-a-r-s-e-n, Elinor Lee, L-e-e, Michael Luttig, L-u-t-t-i-g, Frank Mitchell, M-i-t-c-h-e-l-l, Patsy Natale, N-a-t-a-l-e, 19 Jean O'Donnell, O-'D-o-n-n-e-l-l, Merlin Rochester, R-o-c-h-e-s-t-e-r, Doris Saladino, S-a-l-a-d-i-n-o, Wayne Schlotte, S-c-h-l-o-t-t-e, Donna St. John, S-t-J-o-h-n, Otto

Stahl, S-t-a-h-l, Marvin Weick, W-e-i-c-k; and, it's further stipulated that none of the mentioned employees which total 26 were janitors.

Trial Examiner: Off the record for a moment.

(Discussion off the record.)

Trial Examiner: Back on the record.

Mr. Mueller: The second stipulation worked out between the parties relates to the wage increases granted. I will list the employees, the rate they were making prior to the increase and then the rate they were making after the increase. These wages increases were effective June 4, 1965. Al Bennett, \$1.45 to \$1.55—now, with respect to Mr. Bennett he has been granted an additional ten cent increase which will make his rate \$1.65. However, it has not been determined conclusively whether this will be effective June 25 or July 2d, the reason being—I guess we can stipulate to this—that these increases have to go through Roundy's and they haven't received the payroll sheet back yet. Audrey Bunker, \$1.67 to \$1.77; Nancy Fick, \$1.25 to \$1.35; Tom Horner, \$1.70 to \$1.80; Diane Kaiser, \$1.25 to \$1.35; Mike Luttig, \$1.25 to \$1.35; Leonard Buroker, \$1.35 to \$1.45; Patsy Natale, \$1.35 to \$1.45; Wayne Schlotte, \$1.50 to \$1.60; Kenneth Ackerman, \$1.35 to \$1.45; Harry Hamilton, \$1.35 to \$1.45; William Hamblin, \$1.35 to \$1.45; 20 Richard Breeden, \$1.35 to \$1.45; Marvin Weick, \$1.35 to \$1.45; Harley Larsen, \$1.25 to \$1.35; Richard Barreau, \$1.25 to \$1.35.

Those are the two stipulations we worked out and Respondent is willing to stipulate to those.

Mr. Selby: General Counsel's willing to stipulate to both of those stipulations, as proposed.

Trial Examiner: And does that take care of the subpoena?

Mr. Mueller: Excuse me, may we have a response from Charging Party's counsel?

Mr. Loeffler: Those stipulations are satisfactory. I think Mr. Mueller and I have another one relating to the inter-relationship between the Amended Answer and the objections. Is that right?

Mr. Mueller: Yes.

Mr. Loeffler: Well, it's not my turn, I guess. Apparently there's still something from General Counsel.

Mr. Selby: The General Counsel is satisfied the information the parties have stipulated to is in accord with the request of the subpoena of Mr. Kozel.

Mr. Loeffler: The other stipulation which was reached, given Respondent's Amended and Supplemental Answer, number one, and particularly allegation 1, we've reached an understanding that we may treat the allegation there as an admission to the following objections. Initially, I'll say that the union will dismiss objection number six, or 21 withdraw it. Now, Objection number 5 is still open to litigation because that was not admitted by Respondent's Amended and Supplemental Answer. However, objections, one, two, three, and four are deemed admitted by the Respondent, and we withdraw six.

Mr. Mueller: May we go off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Loeffler: Pursuant to an understanding reached between counsel for Charging Party and counsel for the Respondent, Respondent admits objections, union objections paragraph two, three, and four, and pursuant to this understanding the union withdraws number six, and remaining to be litigated will be objections one and five.

Mr. Mueller: May I make a short addition to that? In the off-the-record discussion in forming the stipulation it was pointed out that paragraph numbered number two in the objections corresponds with paragraph 5(e) of the Complaint, paragraph numbered number three of the objections corresponds to 5(e) and (f) of the Complaint, and paragraph numbered number four corresponds to paragraph 5(b) of the Complaint and paragraph numbered number five corresponds to paragraph 5(a) of the Complaint. With that understanding the stipulation is acceptable to Respondent. May I also ask, since you withdrew number six, could Mrs. Lee be released from her subpoena?

22 Mr. Loeffler: Sure. May we be off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: Back on the record.

Mr. Mueller: I've had marked as Respondent's Exhibit 3 which is a March 21 telegram from Mr. Loeffler and Respondent's Exhibit 4 which is a March 24, 1966 letter addressed to Mr. George Squillacote containing the more detailed objections, and I offer Respondent's Exhibits 3 and 4 in evidence.

Mr. Selby: No objection.

Mr. Loeffler: No objection.

Trial Examiner: There being no objection, they'll be received with the addition that it's not to be indicated as a ruling of any sort by the Examiner at this time that she has any power to pass on the objection based on the time element.

(Respondent's Exhibits 3 and 4 for identification were received in evidence.)

You'll provide copies for the Reporter within a few days, I trust?

Mr. Mueller: Yes, I will.

Trial Examiner: Any other preliminaries?

Mr. Selby: Yes. At this time the General Counsel proposes a stipulation with respect to GC Exhibits 7(a) through 7(q) which are authorization cards of various employees of the Employer with respect to the Charging
23 Party in the case herein. The General Counsel proposes that the signatures on these cards are authentic and they are the individuals they purport to be and that the dates indicated on the face of the card was written by the individual on the date indicated on the card.

Mr. Mueller: Respondent, in response to that stipulation, would—is not going to contest the signatures on those cards or the dates, and make issues of those facts, but would state and reaffirm its position that Respondent has never been obligated to recognize or bargain with the union and this is a continuing fact.

Trial Examiner: This is probably not relevant, but I don't know yet, are any of these 17 cards signed by janitors?

Mr. Mueller: No, not that I know of.

Mr. Selby: No.

Trial Examiner: All right.

Mr. Mueller: I would say because of the approach that Respondent has taken to this proceeding we could very well contend that the cards themselves were irrelevant, but again we're not going to contest the signatures or the dates on those cards.

Trial Examiner: And you also agree that they are members of the appropriate unit?

Mr. Mueller: I'm certainly not going to dispute that
24 whoever signed that, if their name is the same as who we stipulated in the unit, it's not the same person.

Mr. Selby: At this point I want to clarify the record. I indicated there was General Counsel's 7 (a) through (q). I mispoke myself. It would be 7 (a) through 7 (p). So, there's one card less. There are 17 cards, 7 (a) through 7 (p).

Is that stipulation acceptable?

Mr. Mueller: Well, I'm stipulating as to the dates and signatures.

Mr. Selby: That's what I proposed.

Trial Examiner: Are you going to withdraw those?

Mr. Selby: I'm offering these documents into evidence as General Counsel's 7 (a) through 7 (p) and requesting permission to withdraw them for copying purposes.

Trial Examiner: You'll get the copies within a few days?

Mr. Selby: Yes ma'am.

Trial Examiner: They are received.

(General Counsel's Exhibit 7 (a) through (q) was received in evidence.)

Mr. Selby: That's all the stipulations General Counsel has at this time. I wonder if we could take a five minute or longer break if you wanted to? There are some people here that we had for purposes of introducing the cards if that was necessary and I'll have to excuse them now.

Trial Examiner: You need five minutes, about, to decide? All right, we'll recess now for five minutes.

25 (A short recess was taken.)

Trial Examiner: On the record.

We'll recess until 1:15.

(Whereupon, at 12:20 o'clock p.m., the hearing was recessed until 1:15 o'clock p.m., the same day.)

AFTERNOON SESSION

(1:30 o'clock p.m.)

Trial Examiner Klein: The hearing is resumed. Mr. Selby?

Mr. Mueller: Prior to the reopening of the hearing, counsel of the various parties again had discussions as to a stipulation, and it was agreed that the following stipulation would be offered: that the 26 employees who were listed as in the bargaining unit previously this morning on the record are the same employees and the only employees that would have been employed in the unit as requested by the union in its February 14, 1966 demand letter.

Mr. Selby: The stipulation as proposed is agreeable to the General Counsel.

Trial Examiner: Mr. Loeffler?

Mr. Loeffler: Accepted.

Trial Examiner: Anymore stipulations? If not, in the absence of anymore, at this time I'd like to request, if I could, a short statement, very brief, from the parties as to what the issues are at this point, the positions of the parties on the case that's left after the stipulations.

Mr. Selby: The General Counsel is going to adduce testimony from witnesses concerning conduct engaged in by the Respondent in this case indicating that at no time did it have a good faith doubt of the union's majority status and that in furtherance of our proof, that there was no good
27 faith doubt, we will show statements indicating Employer knowledge of the primary union solicitor and threats made by the Employer to the employees concerning loss of hours and wages for purposes of adding flavor and understandability to what we assert is a Joy Silk Mills type of violation in this case.

Trial Examiner: And that will be evidence of the same 8(a)1 that has been admitted?

Mr. Selby: That's right, but it will be for the most part short testimony in that regard.

Inasmuch as the Respondent has not admitted violating Section 8(a)3 of the Act by the constructive discharge of Mr. Kallas, the discharge in the Complaint, we intend to adduce evidence indicating and proving that the motivation of the Employer was to cause him to quit his employment. With respect to the 8(a)5 allegations it's our position that the vast amount of 8(a)1 conduct together with the constructive discharge of Mr. Kallas and the refusal to recognize when there was no doubt of the majority status constitutes the 8-5.

Trial Examiner: Mr. Loeffler, that about coincides with your views, doesn't it?

Mr. Loeffler: Yes. In addition, Miss Trial Examiner, I think we have one more stipulation to go, and we'll do this right now, between the Respondent and the Charging Party. This particular letter from the Regional Director was issued by the Regional Director March 21st, 1966. It's 28 addressed to myself with copies to Mr. Mueller and to the union.

Trial Examiner: Do you have copies or will you have to withdraw it?

Mr. Loeffler: I'll have to withdraw it and make copies. Of course, although we do take the position that the timeliness of the objections cannot be litigated in this forum because of the failure to appeal the Regional Director's decision, even if that weren't the case, we would argue the purpose of the five-day rule was well satisfied here with the telegram and the subsequent detailed position. Additionally, that letter, we would argue, stops either party from claiming that the union was untimely because that was a letter received within the five-day period indicating to the union that the Regional Director regarded that telegram as timely notice and in reliance upon that telegram the detailed

statement of position heralded in the telegram was then sent later.

We will also offer testimony in support of our allegation that an appropriate remedy in this instance would be an order directing, if the Employer is found to have committed an 8(a)5 allegation, an order directing the Employer to compensate the employees the difference between the rate they are now receiving and then will continue to receive throughout the litigation and mean rate contained in contracts negotiated in comparable businesses by the particular union, and to that end we'll offer Mr. Moreth's testimony.

29 Trial Examiner: Before you go on—

Mr. Loeffler: I'll call that Charging Party's 1.

(The above-mentioned document was marked for identification as Charging Party's Exhibit Number 1.)

Trial Examiner: Is there any objection, Mr. Mueller?

Mr. Mueller: No objection to the receipt in evidence—that is the March 21, 1966 letter?

Trial Examiner: That's right.

It will be marked and received and two copies substituted when it is withdrawn.

(Charging Party's Exhibit 1 for identification was received in evidence.)

Mr. Mueller, do you care to make a brief statement of position?

Mr. Mueller: My only statement would be that I think General Counsel's short resume of what the issues are is beyond the scope of the pleadings somewhat in that the issues as—I'm not quite sure what you see as designated being left to be litigated. He intermixed with the designation certain proofs that he's going to offer and I suppose

a question is going to be whether or not that proof is admissible because of any issue remaining to be litigated.

Trial Examiner: What do you believe the issues remaining are?

Mr. Mueller: I think we place upon each other the Amended and Supplemental Answer and Complaint
30 and also bring into that the objections, I would believe we have left as an issue as alleged in the Complaint, paragraph 5(a).

Trial Examiner: That's not really at this point a factual issue, is it? That's based entirely on the letters.

Mr. Mueller: That's an issue. I'm not saying whether it's factual or legal. I'm just saying that's an issue.

Trial Examiner: Uh huh.

Mr. Mueller: After all, your issues are determined by your pleadings. Otherwise, let's not have pleadings and let's go ahead and just talk about the case.

Since there's no admission to paragraph 6, obviously, that would remain an issue.

Trial Examiner: Paragraph 6? That's the 8(a)3, isn't it?

Mr. Mueller: Right, that would remain an issue. However, whether or not the evidence is admissible, we'll get to that question when it comes up at the proper time.

There are certain issues that remain——

Trial Examiner: You stated earlier your basic position is that Respondent had no obligation to bargain when the demand was made?

Mr. Mueller: That's correct.

Trial Examiner: Fine. Let's proceed.

Mr. Selby: I'd like to ask Respondent what their reason

31 for stating that is, why they feel they had no obligation
to bargain.

Mr. Mueller: That's a matter of my defense.

Mr. Selby: I'd like to know right now.

Trial Examiner: No colloquy, gentlemen.

Mr. Selby: Well, we're asking for positions at this time.

Trial Examiner: Yes, would you care to explain? I think
it would make the evidence that much more intelligible.

Mr. Mueller: I should explain my defense prior to the
time their case in chief goes on?

Trial Examiner: I'm not going to force you to.

Mr. Mueller: I should hope not.

Trial Examiner: Everybody has stipulated so well to
everything I thought we could get right down to the heart
of this case.

Mr. Mueller: I believe we're down to the heart of this
case right now and it's ready to be tried.

Trial Examiner: Fine. Would you proceed?

Mr. Selby: OK. General Counsel calls Rick Barreau.

Whereupon,

RICHARD BARREAU

was called as a witness by and on behalf of General Counsel
and after being duly sworn, was examined and testified as
follows:

DIRECT EXAMINATION

32 Q. (By Mr. Selby) Mr. Barreau, please give your
name and address, spelling your last name?

A. Richard Barreau, B-a-r-r-e-a-u, 943½ Euclid
Avenue, Beloit.

Q. How old are you?

A. Seventeen.

Q. Were you employed by the Zinke's Food Company?

A. Yes, I was.

Q. For what period of time were you employed by them?

A. From about last August until three weeks ago.

Q. What were you doing?

A. Stock boy and carry out.

Q. Mr. Barreau, you are aware of an election having been conducted at the Zinke's Food Stores?

A. Yes.

Q. Under the auspices of the NLRB?

A. (Witness nods head.)

Q. Prior to the election, do you recall having a conversation with Mr. Thomas Kozel?

A. Yes.

Q. Who is Mr. Thomas Kozel?

A. The manager of Zinke's Shop Right.

Q. Do you recall about when in point of time this conversation took place?

A. I have no idea. It was before the election.

Mr. Mueller: I'm going to have to object. I don't
33 see the relevancy of this, I don't know where it's going to lead us to. If it's going to lead us to a particular conversation of what was said between the two of them, I don't know where in the posture of the pleadings this evidence is admissible as being relevant.

Trial Examiner: Mr. Mueller, I think that was one of the reasons we tried, we gave you an opportunity to state the nature of your defense. Since you haven't nailed it down that way—

Mr. Mueller: This isn't my defense. This is what's remaining to be litigated.

Trial Examiner: If I may finish my statement, please?

I believe Mr. Selby's position is that the majority of authorization cards had been signed and valid on the demand date. The union thereafter lost the election and it's his contention that the 8(a)1 conduct which you have admitted caused the loss of the majority and I think it is, therefore, quite appropriate for him to present evidence designed to show that. And, for that reason I'm overruling your objection and will permit him to continue his examination.

Mr. Mueller: May I ask, you're going to allow this evidence notwithstanding that it's the same 8(a)1 that's admitted?

Trial Examiner: That is my ruling.

Mr. Mueller: What is the issue, then, that it pertains to, if I may ask, so that I might know where we're going?

34 Trial Examiner: I think, Mr. Mueller, I just stated the way I see it. That's why I have given you an opportunity——

Mr. Mueller: Is this——

Trial Examiner: If I may, please—if you would like to state your position, I'm not compelling you to give your defense at this time, but in the absence of that I'm ruling that Mr. Selby is entitled to put in evidence of specific conduct in support of his contention he stated, that the specific conduct of the Employer caused the union to lose the election after it had a majority of authorization cards.

Mr. Mueller: Miss Examiner, that's a finding of fact that you——

Trial Examiner: Mr. Mueller, I've ruled. I'm going to

make that finding one way or another on the basis of evidence. You may have an exception.

Mr. Mueller: Is this a judicial proceeding or an administrative investigation?

Trial Examiner: This is a complaint proceeding.

Mr. Mueller: Quasi-judicial?

Trial Examiner: I've made my ruling and you have an exception.

Mr. Mueller: Well, let the record show——

Trial Examiner: Will you please——

Mr. Mueller: Let the record show, since you didn't state the preliminary statements that is usual to these proceedings, that I am entitled to a continuing exception to your ruling.

35 Trial Examiner: Mr. Mueller, you were provided with——

Mr. Mueller: A continuing objection?

Trial Examiner: No, an opening statement when the Complaint was filed.

Mr. Mueller: No, no.

Trial Examiner: You have a continuing exception to the line of questioning.

Mr. Mueller: Also a continuing objection? I have the continuing objection to the ruling?

Trial Examiner: Mr. Mueller, I have ruled that Mr. Selby may continue on the course of examination he has started.

Mr. Mueller: Would you see to it the record shows I except to your ruling?

Trial Examiner: I said you have a continuing exception. Please proceed.

Q. (By Mr. Selby) Mr. Barreau, directing your attention to this conversation you've indicated to us before, will you tell us where it took place?

A. It was in the store by the dairy case.

Q. Do you recall what time of the day or night it was?

A. It was at night.

Q. All right, was anybody else present?

A. Not at the time, no, there wasn't.

Q. What do you recall being said during the conversation?

A. Well, he was telling me——

36 Q. Who's he?

A. Mr. Kozel.

Mr. Mueller: When was this?

Mr. Selby: I think the witness has indicated it was at some point of time prior to the election.

Mr. Mueller: Can we get it down any further than that, just for purposes of cross examination?

Trial Examiner: Mr. Mueller, you'll have your opportunity to cross examine.

Mr. Mueller: Well, I want to have my notes so I can cross examine.

Q. (By Mr. Selby) Mr. Barreau, in point of time, can you tell us approximately how many weeks prior to the election this conversation took place?

A. I imagine about two weeks.

Q. Fine. Now, will you tell us what was said during the conversation and by whom?

A. Well, Mr. Kozel was telling me that if the union came in he would have to hire night stockers to come in because he couldn't afford the wages of, you know, the kids, because

they usually stock shelves at night and that, in turn, would eliminate a few of the kids because they could hire men after 9:00 o'clock to do the work and it would take them half the time because there'd be no customers in the store then.

Q. Why couldn't the kids, as you referred to them, work at night doing night stocking?

37 A. Well, most of the kids are under 18 and he wouldn't allow them to work after 9:00 o'clock when they're under 18.

Q. Do you know whether there's a Wisconsin Industrial Commission rule that prohibits that type of work after 9:00 by children under 18?

A. I've heard there's a law they couldn't work after 9:00, but I wasn't sure of it.

Mr. Selby: No further questions.

Trial Examiner: Mr. Loeffler, do you have any questions?

Mr. Loeffler: No questions.

Mr. Mueller: I have no questions.

Trial Examiner: Thank you very much.

(Witness excused.)

Off the record.

(Discussion off the record.)

Trial Examiner: On the record, please.

I thought I had my ruling clearly made. I will state it once more.

Mr. Mueller: In other words, if I give my statement of position——

Trial Examiner: May I? May I continue my statement, please?

The 8(a)1 has been admitted. On the basis of an admission of 8(a)1 I would assume an order under 8(a)1 would be in order. There might possibly be some reason for
 38 testimony as to remedy, but putting that aside, I am not sure, and I'm ruling at this point, that the admission of 8(a)1 is not necessarily sufficient for a determination of whether 8(a)1 misconduct did cause a loss of majority by the union, which I understand is the 8(a)5, the gravamen of the 8(a)5 complaint. Have I stated your position?

Mr. Selby: Yes, Miss Trial Examiner.

Trial Examiner: Therefore, I have ruled, and I rule again, that Mr. Selby may present evidence of the conduct which he claims is relevant to the 8(a)5 even though it may also have been 8(a)1 conduct which you have admitted.

Mr. Mueller: So this is getting in under 8(a)5?

Trial Examiner: That is correct. And, again, Mr. Mueller, I suggest that it's exactly why I gave you an opportunity to state your position. I am not sure that we have any factual issue here, depending on what your defense is. We may have simply a legal issue, or what conclusion to be drawn from admitted facts. But since you don't want to state your defense I have ruled that Mr. Selby may put in his case.

Mr. Mueller: Well, I think then in view of your statement that this is getting in under 8(a)5 which, previously, or at least I didn't understand that's what you were saying, I would then at this time state our position as to our position of defense.

Trial Examiner: All right.

39 Mr. Mueller: If that means we're not going to be litigating a dead horse, or at least raises that possibility.

Trial Examiner: Fine, I'm trying to find out really what

the issues are here and that we're going to have testimony on.

Mr. Mueller: As I stated, Respondent has not admitted paragraph 6 of the Complaint which alleges the constructive discharge. Now, I take it that would be, therefore you would receive factual testimony so that you might make a determination on that.

Trial Examiner: Yes.

Mr. Mueller: Our position basically on that is we feel that any evidence to be offered or to be adduced as to paragraph 6 of the Complaint and the constructive discharge is irrelevant because the matter has, he has been offered reinstatement, he refused, he's been given back pay—

Trial Examiner: I understand your position on the 8(a)3. What is your position on the 8(a)5?

Mr. Mueller: On the 8(a)5, on the date of demand it's basically that the Employer, doubting the genuineness of proving the majority by offer of a card check, stated so in his reply letter, and this I'll offer, the reply letter, and I'll also offer evidence of past representation cases which give the basis for this doubt of the genuineness proving the majority status by authorization cards, and that notwithstanding there might be bargaining relief sought,
40 it cannot be granted because the objections were not timely filed or in sufficient form, and under the present—

Trial Examiner: May I interrupt at that point? That is objections to the election, but what is the relevance of the cards on the demand date? Assume, let's assume for the moment, I'm trying to clarify the issues—

Mr. Mueller: Yes, go right ahead.

Trial Examiner: —assume for the moment the Regional Director was wrong—

Mr. Mueller: All right.

Trial Examiner: —when he ruled that the objections were timely. That would not dispose of the General Counsel's and the union's claim of a majority on the demand date.

Mr. Mueller: And destruction by certain conduct, which would follow, right?

Trial Examiner: I'm talking about just the demand date.

Mr. Mueller: And the majority status and that's destruction. However, even assuming that, bargaining relief could not be granted because the objections to the election, the election cannot be disposed of unless there's a proper objection, timely and in sufficient form.

Trial Examiner: I think there's a legal issue nobody's quite ready to agree to at this point.

Mr. Mueller: Following which bargaining relief can be granted. In other words, assuming that the union had
41 a majority status on the demand date and assuming that that majority status was destroyed by the commission of 8(a)1, bargaining relief is precluded because of the technicality of the objections not being timely filed nor in sufficient form. Now, that's the legal issues, one which you've already indicated you don't know whether or not you have the jurisdiction to decide, but briefing will take care of that.

Trial Examiner: All right. One more question I want to ask you on your position, then I do want to get on with the testimony, and that is, if it were found, if the evidence led to a conclusion that Respondent did not have a good faith doubt of the majority status on the demand date, is it your position that still because of the subsequent loss of an election there could be no bargaining right?

Mr. Mueller: Well, the good faith doubt, our position is good faith doubt springs from the fact of the doubting

of the showing of a majority status by authorization cards.

Trial Examiner: I'm not sure——

Mr. Mueller: In other words, just because someone makes a demand doesn't mean that you have to recognize them, and the law isn't that far yet. In other words, when the demand is made the Employer can in good faith doubt that majority status and is entitled to an election to determine the majority status.

Trial Examiner: I see. Now, in answer to my question, just a straight answer I would like, if on the demand
42 date the Employer, the Respondent, had no doubt about the authenticity of these authorization cards, is it your position that it would still not be obliged to bargain at that point but could insist on an election?

Mr. Mueller: Well, I'd have to go outside the facts of the case to answer that, and I don't know if you want me to do that.

Trial Examiner: No, let's proceed with the testimony. I've been trying to simplify the issues and I think I'm just at this point not getting that.

Mr. Mueller: May I hear the question once again? Maybe I can give you a straight answer.

Trial Examiner: My question was, if on the demand date the Respondent had no doubt about the authenticity of the authorization by a majority of the unit employees, is it your position that it would still not be obliged to bargain, but would be entitled to an election?

Mr. Mueller: I would guess that's an academic question and the answer to that would have to be that, I think you asked me in the negative, I would believe it would be no. And may I explain my "no" so you'll know what I mean by that?

Trial Examiner: Yes.

Mr. Mueller: In other words, if he had no good faith doubt as to the majority status, then bargaining relief would be in order. However, the position of Respond-
43 ent is that there was good faith doubt.

Trial Examiner: All right, with that let's proceed, Mr. Selby.

Mr. Mueller: Now, may I ask how this discussion, what effect this discussion has on your prior ruling on my objection as to the introduction of this—

Trial Examiner: It changes not a thing.

Mr. Mueller: And you're—

Trial Examiner: I'm allowing Mr. Selby go ahead with the evidence as he started.

Mr. Selby: Yes, I would just like to recall Mr. Barreau for two questions.

Trial Examiner: All right. You're under oath, Mr. Barreau.

(Witness Richard Barreau resumed the stand.)

FURTHER DIRECT EXAMINATION

Q. (By Mr. Selby) Mr. Barreau, at the time you heard this conversation you described earlier between yourself and Mr. Kozel, do you know approximately how many employees of Zinke's were under 18 years old?

A. Well, I think all the boys.

Q. How many would that be?

A. About five, I think, five.

Q. Do you know whether these other five under-18-year-olds had any conversations with Mr. Kozel concerning what you've described to us?

44 A. Not that I know of. They might have.

Q. Did you have any conversations with them?

A. Besides this one?

Q. No, did you have any conversations with the other under-18-year-old employees concerning your discussion with Mr. Kozel?

A. No. Well, I told maybe one of them about it, one or two of them, but that's about all.

Q. How many?

A. Well, Mr. Kallas for one.

Q. Mr. Kallas?

A. Yes, but he isn't one of the boys.

Q. How about the under-18-year-olds?

A. Two of them I think.

Q. Do you recall their names?

A. Mike Luttig for one and Harley Larsen.

Mr. Selby: No further questions.

Mr. Loeffler: I have no questions.

Mr. Mueller: I have no questions.

Trial Examiner: Thank you again, Mr. Barreau.

(Witness excused.)

Mr. Selby: Mr. Kallas, please take the stand.

Whereupon,

EDWARD KALLAS

was called as a witness by and on behalf of General Counsel and, after being duly sworn, was examined and testified as follows:

45

DIRECT EXAMINATION

Q. (By Mr. Selby) Will you please give us your name and address, spelling your last name?

A. Edward Kallas, K-a-l-l-a-s, 226 Fisher Road, South Beloit, Wisconsin.

Q. How old are you, Mr. Kallas?

A. Twenty-five.

Q. Have you been employed by the Zinke's Food grocery store?

A. Yes, I have.

Q. What was the period of time that you were employed by them?

A. From the middle of October of '64 until April of '66.

Q. And what were your duties for the store?

A. In the produce department.

Q. You worked in the produce department?

A. Yes.

Q. Anybody else work in the produce department with you?

A. Yes.

Q. What were their names?

A. Well, there were several of them.

Q. Let us say for the period February through March 1966?

A. Wayne Schlotte was part time and Diane Haime was full time.

Q. Who was the person to whom you were responsible?

46 A. Tom Kozel.

Q. Now, directing your attention, Mr. Kallas, to January 23d, 1966, was there any unusual occurrence in the store on that day?

A. Yes, on that day I quit, notified them that I was going to quit.

Q. I'm sorry, I didn't hear you.

A. I say, on that day I notified them that I was going to quit.

Q. Kozel?

A. Yes.

Q. All right. What was the reason for telling him this?

A. The reason was because they kept on finding fault with the department, with my work and with the other work of those who worked in there, all the time, increasing, and I couldn't take any more of it.

Q. I'm sorry, I didn't hear the last part of your answer.

A. I said it was increasing all the time to the point where I couldn't take any more, on that day.

Q. What were some of the things that were happening?

A. That he did?

Q. Yeah.

A. Well, he'd, as I said, find fault with the help, if they weren't working to the best ability, talking too much, things weren't being rotated, work wasn't being done——

47 Trial Examiner: Would you please try to talk a little louder? We can all get it easier.

The Witness: And we weren't checking the rack where the produce was displayed and we weren't removing the spoiled garbage, as they call it, off from the rack.

Q. (By Mr. Selby) Now, did you have any special responsibility in this regard?

A. Yes, I was to see that it got off.

Q. Do you recall anything further in your conversation with Mr. Kozel that afternoon?

A. Yes. I told him that I was going to leave as soon as he found someone else or I would stay until he trained someone, and he only replied, "Oh, yeah," and then walked

away. Later in the afternoon he called me over to the other side of the store and he told me that he wasn't finding fault with my work, that he was trying to help me, but instead of helping me he hurt me, and that I should reconsider what I was going to do because it was my decision.

Q. Do you recall anything further in that conversation?

A. He asked me to let him know.

Q. Was that the end of the conversation?

A. As far as I remember.

Q. Was anybody else present during this conversation?

A. No, no one was present.

Q. About how long did it take?

48 A. Maybe five minutes.

Q. And where did it take place?

A. In the back storage area of the store, the grocery section.

Q. Mr. Kallas, directing your attention to the next day, did you have a conversation with Tom Horner?

A. Yes, I did. I came to the store at ten o'clock, or thereabouts, and Tom Horner came up to me and said that Tom had told him that I was the worst produce manager he ever had.

Mr. Mueller: I object. This is hearsay.

Trial Examiner: Objection sustained. You can reword the question. Meanwhile, who is Horner?

Mr. Selby: Wait, Miss Trial Examiner, before you sustain this objection, which you've done already, we're not offering this statement for the truth of the matter asserted. We're offering it to show what conduct was engaged in by Mr. Kallas as a result of what was told to him.

Trial Examiner: I understand that.

Mr. Selby: Whether or not that statement is in fact true we're not asserting, but we need that statement to proceed further in this hearing, to make it understandable.

Trial Examiner: And I still think you can reword the question. It's not a terribly vital matter.

Mr. Selby: The original question was, did you have a conversation with Mr. Horner, Mr. Kallas, and he's
49 telling us about the conversation. I don't know how else I can reword it. He's telling us what the conversation was about.

Trial Examiner: Mr. Selby—well, Mr. Kallas, who is Mr. Horner?

The Witness: He's a part-time grocery man.

Trial Examiner: He's just an employee?

The Witness: Yes.

Trial Examiner: I sustain the objection. Proceed.

Mr. Selby: Miss Trial Examiner, can you tell me why you're sustaining the objection?

Trial Examiner: All I know is, he's been asked what somebody said to him who is not a representative of the Employer. The objection was that it was hearsay, and as of this time, it sounds like hearsay. Now, please proceed.

Mr. Selby: Can I just say one thing, Miss Trial Examiner? This individual is only relating to us a conversation which he had. He's telling us about a conversation he had with Mr. Horner, and that's all I'm having him testify to. I don't see how that's hearsay. He's testifying to something he heard, namely, that Mr. Horner told him something. Now, he either told him or he didn't tell him.

Trial Examiner: You have an exception. Will you please proceed?

Q. (By Mr. Selby) Mr. Kallas, what transpired after

your conversation with Mr. Horner, if anything?

50 A. Well, I went back to the produce department to pick up a few of my things, and by that time Tom Kozel came down and asked me if I was going to stay or not, and I replied that I could not stay after having been told I was the worst produce manager he ever had. He said, "I did not say that." He said, "I only added you were not the worst, you were the second worst." Then I became angry and said a lot of things. I told him that he had 150 people working in the store since I came that have gone and left and that he found faults with every one of them until they either quit or were fired. He said, "There may have been 150, but there were 150 that weren't any good." I said, "No, it wasn't that they weren't any good." Then, I said he wasn't any good, not the employees, and it was he who was ruining his own business, that he wouldn't pay any attention to the decent customers, but only to some of the whores that came into the store.

Trial Examiner: Try to keep your voice up, please.

Q. (By Mr. Selby) Do you recall anything else?

A. Not at the present time, not right now.

Q. What happened after that?

A. Then I left the store. I told him that I don't get mad very often, but when I do I'm a son of a bitch. He patted me on the shoulder and walked away and I left the store.

Q. Did you come back to work the next day for Zinke's?

A. No, I did not.

51 Q. Where did you go to work?

A. The next day I got a job at Piggly Wiggly.

Q. What department?

A. As produce man in the produce department.

A. The next day I got a job at Piggly Wiggly.

A. I worked there from Wednesday until Friday afternoon, late.

Q. Directing your attention to about January 28, did you have a phone conversation with Tom Kozel?

A. Yes. I called him on the phone and asked if he'd like to talk to me, and he said yes. So, I went over to the store and I explained to him that the day that I quit was perhaps the day that I shouldn't have come to work because I couldn't take any of that any more, and I said I said a lot of things perhaps I shouldn't have said, but I meant all of them. He said, "We all say things sometimes we don't mean or shouldn't say." He asked if I wanted to come back, and I said I did. He said, "Do you really?" And I said, "Yes." He asked when, and I said "Today." He said, "Today?" And I said, "Yes."

Q. Did you come to work that day?

A. Yes.

Q. And you worked until what date?

Mr. Mueller: Can you establish what day that was?

Mr. Selby: I directed his attention to January 28 and asked him if he had a conversation on the phone, he said he did, and he went down to the store and had a conversation with Mr.

52. Q. (By Mr. Selby) How long did you continue working then from that day?

A. I continued working until Thursday before Easter. I guess it was about the 7th of April.

Q. About the 7th of April?

A. Yes.

Q. Directing your attention to early February, 1966, Mr. Kallas, did you have a conversation with William Moreth?

A. Yes, I did.

Q. Who's William Moreth?

A. He's the representative of the Retail Clerks union.

Q. The Charging Party in this case?

A. Yes.

Q. Will you tell us what occurred in that conversation?

A. He asked me if I was interested in the union, if I ever gave it much thought, and I told him I was. He explained about the union and we together went over to Doris Saladino's apartment——

Q. Doris Saladino is an employee?

A. Yes, a checker, and she still is.

Q. What happened there?

A. There he explained the benefits of a union and explained the Kohl's contract to us as an example and explained to us that we had the right by law to organize in a store, we were protected by law, and explained to us
53 the cards and that by signing the cards we were authorizing the union to represent us, if we had a majority they would make a demand to be recognized.

Mr. Mueller: Did we establish a date of this conversation?

Mr. Selby: That conversation was some time in early February, is that right?

The Witness: Yes.

Q. (By Mr. Selby) Do you know the exact date of the conversation?

A. It was on a Wednesday night.

Q. About the 8th of February?

A. The 8th or 9th.

Q. All right, you received the cards at that time?

A. Yes, he gave Doris Saladino a card and he gave me several cards.

Trial Examiner: We'll have a five minute recess.

(A short recess was taken.)

Trial Examiner: On the record.

Q. (By Mr. Selby) Were those cards similar to General Counsel's Exhibits 7(a) through 7(p)?

A. Yes.

Q. Were they filled out or in blank?

A. They were blank.

Mr. Mueller: I have to make an objection——

54 **Mr. Selby:** That's the last question I have on them, anyway.

Trial Examiner: I think, Mr. Mueller, the objection you were about to offer was much what I was going to ask when I wanted to say something off the record, so that's where we would be, anyway.

Q. (By Mr. Selby) How long did the meeting at Doris Saladino's house take?

A. It lasted about an hour.

Q. All right. Directing your attention to February 11, 1966, did you attend a meeting at Roy's Drive Inn?

A. Yes, I did.

Q. And what was the purpose for that meeting?

A. The purpose was to explain to those who might be interested in the union the purpose of the union and what it had to offer.

Q. Were any cards signed at that time?

A. Yes, they were.

Q. And who received those cards?

A. Rick Barreau——

Q. No, when the cards were signed, who received them from the signers?

A. Oh, I did.

Q. The Charging Party in this case?

A. Yes.

Q. Will you tell us what occurred in that conversation?

A. He asked me if I was interested in the union, if I ever gave it much thought, and I told him I was. He explained about the union and we together went over to Doris Saladino's apartment——

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A. Rick Barreau——

Q. No, when the cards were signed, who received them from the signers?

A. Oh, I did.

Mr. Mueller: May I offer an objection? The cards that General Counsel is going to rely on are in evidence. They've been admitted in evidence and their signatures and
55 dates have been stipulated to. I don't see where we're going.

Mr. Selby: We're showing the extent of his participation in the organizational campaign.

Mr. Mueller: Well, OK. I'll withdraw my objection for the time being.

Trial Examiner: Proceed.

Q. (By Mr. Selby) As a matter of fact, Mr. Kallas, with respect to General Counsel's Exhibit 7(a) through 7(p), were not you the person who at one time received all of these cards?

Mr. Mueller: Mr. Selby, if you want to stipulate——

Trial Examiner: Mr. Mueller——

The Witness: That's right.

Trial Examiner: Did you want to go off the record to offer a stipulation?

Mr. Mueller: I'll offer it on the record. If, in fact, Mr. Kallas was the employee organizer, we'll stipulate to that fact.

Mr. Selby: We want to show the extent of his organization participation.

Mr. Mueller: Well——

Trial Examiner: Do you include in your offer to stipulate the Respondent's knowledge that he was the employee organizer?

Mr. Mueller: Yes, we'll stipulate to that.

Trial Examiner: Mr. Selby, Mr. Mueller will stipulate that. Do you need more than that?

56 Mr. Selby: I certainly would stipulate to it, but there is certain evidence which would be intertwined with the Employer's knowledge that we're going to have to bring out and if that's going to foreclose me from bringing out this testimony then there's no sense in stipulating.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: Back on the record. Proceed with the testimony.

Mr. Mueller: Miss Trial Examiner, I take it that stipulation has not been agreed to?

Trial Examiner: I assume the stipulation has been withdrawn.

Mr. Mueller: Well, I still offer it.

Trial Examiner: Oh, you do?

Mr. Selby: We'll accept the stipulation, we'll so stipulate, General Counsel.

Trial Examiner: Charging Party?

Mr. Loeffler: Yes.

Trial Examiner: Let me say at this point, I assume that Mr. Loeffler agrees to any stipulation General Counsel makes unless he indicates the negative.

Mr. Loeffler: Fine.

Q. (By Mr. Selby) Directing your attention, Mr. Kallas, to February 19th of this year, before six o'clock p.m.,
57 did you have a conversation with Tom Kozel?

A. Yes, I did.

Q. Was anybody else present?

A. Yes, Diane Haime was present and so was Wayne Schlotte.

Q. What happened?

A. First he——

Mr. Mueller: I'm going to offer an objection as to the relevancy. I don't see that this evidence of the conversation is going to be relevant.

Mr. Selby: How do you know?

Trial Examiner: Objection overruled. Let's get on with the testimony.

The Witness: He asked Diane and Wayne to leave and then he said to me, "Have you been contacted by the union?", and I replied, "Yes," and he said, "Are you trying to get others to sign union cards?" I said I was not, that the union representative was organizing the union.

Mr. Mueller: Miss Examiner, may I again——

Trial Examiner: You may object.

Mr. Mueller: ——object to that evidence. We just had stipulations as to Respondent's knowledge. I can't see what that testimony goes to, obviously proving knowledge.

Trial Examiner: I have overruled the objection. I believe in a constructive discharge I can anticipate your brief
58 arguing that knowledge does not prove causal connection and I'm going to have to, as I see it, some time decide whether there was a causal connection between this man's union activity and what the General Counsel alleges was a constructive discharge, and I cannot make that determination on the basis of your stipulation that the Respondent knew he was organizing the union.

Mr. Mueller: Then may I make one further comment that follows yours, and that is that in addition whether or not there would be a causal connection Respondent takes the position that that is irrelevant because this employee has been offered reemployment, he has——

Trial Examiner: I understand as a legal matter, Mr. Mueller, you contend that the 8(a)3 is moot.

Mr. Mueller: And anything you prove here is not going to further effectuate the policies of the Act, therefore, just like in any lawsuit——

Trial Examiner: Mr. Mueller, if I were ready to rule on that point now I would rule on the evidence, but I am going to have a sufficient record.

Mr. Mueller: That's certainly your authority.

Trial Examiner: So let us proceed and get on with the testimony.

Mr. Mueller: So the record is clear, it's our position as to the taking of all this evidence, we just feel——

Trial Examiner: You object, it's irrelevant, your
59 objection is there, you have an exception, and let's please get on with the evidence.

Q. (By Mr. Selby) Mr. Kallas, I don't know whether your train of thought has been interrupted or not, if I didn't have notes in front of me mine would have been, can you tell me what happened next, if you can recall?

A. Yes, he said that's a dirty rotten trick to pull on me after I hired you back. He said, "I take it you're only unhappy here and you're doing this to spite me. If the union comes in the store will have to close, we can't afford it." That ended the conversation.

Q. Do you recall anything about a decision?

A. Oh, the decision in the future will be up to me.

Q. Who said that?

A. Tom Kozel.

Q. How long did this conversation last?

A. One or two minutes.

Q. Directing your attention, Mr. Kallas, to February 23,

do you recall any conversation with Doris Saladino at the store in the afternoon?

A. Yes I do.

Q. Will you tell us what happened in that conversation?

Mr. Mueller: Objection if he's going to testify as to what was said.

Trial Examiner: He hasn't asked him what was said.

60 The Witness: I walked to the front of the store where Doris Saladino was and she told me she was——

Mr. Mueller: Objection.

Trial Examiner: Sustained.

Mr. Selby: Miss Trial Examiner, I'm going to make an offer of proof at this time through this witness by questions and answers, if I may.

Trial Examiner: As a result of that conversation what did you do, if anything?

The Witness: There was nothing I could do, except only what I could anticipate in the future.

Trial Examiner: What did you do after the conversation?

The Witness: Nothing.

Trial Examiner: You may make an offer of proof, Mr. Selby. I have sustained the objection to the question as worded, and you may make an offer of proof unless you think you can reword the question some other way.

Mr. Selby: No, I asked the witness what he recalled in the conversation. If he heard it presumably he can testify to what he heard. But, if we can't do it that way, I would like to do it on a question and answer basis through the witness as an offer of proof. May I do it that way?

Trial Examiner: Well, just make your offer of proof.

Mr. Selby: I'll make the offer of proof that this witness would testify that in this conversation with
 61 Doris Saladino on February 23d, he was told by Saladino that Tom Kozel asked her to type up a list which the NLRB requested of the names of the employees of Zinke's Foods and that she should copy this list from the Employer's records and that——

Trial Examiner: Is she here?

Mr. Selby: She isn't here right now but the Employer has indicated that he would make her available to us.

Trial Examiner: All right.

Mr. Selby: That the list of names was gone over and that the name of Kallas came up and Kozel put a mark by the name and said, comma, quote, "That dirty son of a bitch," unquote—I'm sorry, strike the quote at the end, "if he wants to continue working here, it is going to be pretty rough on him."

Now, this is information which was related to Kallas and that's the end of the offer of proof.

Trial Examiner: All right, that's the offer of proof.

Mr. Mueller: Well, may I ask, I would naturally contend it's hearsay at this point, but may I ask if you're prevented from bringing in from this witness because of it being hearsay, that this is the only reason you'd call Doris Saladino?

Mr. Selby: Just one moment, I'll have to check.

No, there's other information to be elicited from Miss Saladino.

Mr. Mueller: Miss Examiner, I can't really understand——

62 Trial Examiner: You have objected to it. I sustained your objection and we had an offer of proof.

Mr. Mueller: If I may say so, with your permission,

because of the posture of this thing, if I could introduce about three or four letters or three or four exhibits which could be stipulated in and we could have Mr. Loeffler's testimony of whatever he wants to put forward as to the further remedy that he's going to request, then we could leave and you could have Mr. Selby sit here and call whomever he wants and we'd have no objection.

Trial Examiner: Mr. Mueller, I said I have excluded that question of Mr. Kallas.

Mr. Mueller: No, this doesn't go to that, it goes beyond that. It goes to whether or not Mr. Selby on behalf of General Counsel is going to call in 15 witnesses to testify to things that were alleged in the Complaint and admitted.

Trial Examiner: Mr. Mueller, we've been through this once and I do not expect to rule on the same objection again. You have a continuing exception. Now, will you please, Mr. Mueller—

Mr. Mueller: May I make a request then? May I make the request that at this point for purposes of expediency to the Employer, the Respondent herein, that you allow Mr. Loeffler to put in whatever evidence he wants to and that you allow me to make certain offers of documents and then at that point allow Mr. Selby on behalf of General
63 Counsel to proceed with whatever he wants to put in.

Trial Examiner: I have ruled that we are proceeding now to take Mr. Selby's evidence.

Mr. Mueller: You deny my request then?

Trial Examiner: On his case, it's his Complaint, and now if we may get on with the testimony, if you will?

Mr. Mueller: May I ask, off the record, for a moment?

Trial Examiner: No, we will not go off the record. We will please proceed with the hearing.

Q. (By Mr. Selby) Mr. Kallas, directing your attention to March 11 of this year, about 3:30 p.m., do you recall a conversation with Mr. Kozel? In the break room?

A. Yes, I do.

Q. Will you tell us about that?

A. I was up there taking a break. He come up the steps hollering at me, asking me what in the hell I was doing up there and what in the hell I was doing up there before, and I asked when, and he said when Stockwell, the Daily News advertising man was there. I explained to him that I was on my break now and I was on my lunch hour at that time. And he said, oh, and he turned around and went away. Then I went downstairs to my time card and showed it to him, explained to him that I was on my lunch hour earlier and on my break at that time.

Q. Did he respond at all to that?

A. He said, OK.

64 Q. Now, directing your attention to about half an hour later, did you have a further conversation with Tom Kozel in the produce department?

A. Yes, I did.

Q. Will you tell us about it?

A. He came back and started finding faults again and started going through the rack.

Q. By rack you mean ——?

A. The produce display, rechecking and saying that we weren't doing our work, wasn't watching what we were doing, and he brought back several things that he'd found that shouldn't be out there he thought, and brought them back in there. Then he went out and after awhile he brought, he went through the reduced cart which has a lot of reduced vegetables, and he found a bunch of broccoli and he came back to the produce area with the broccoli and put it towards me and said, "Take this home and eat it, it's not fit

for people," and with that he pushed it towards my face, and I backed away and he pushed it again at me. I backed away again and he threw it down in the garbage can and left.

Q. Was that the end of the discussion at that time?

A. Yes.

Q. Directing your attention to approximately an hour later, or about 5:30 p.m., did you have another conversation with Mr. Kozel?

65 A. Yes, I did.

Q. Was anybody else present?

A. Yes, Diane Haime, was present, and Wayne Schlotte was out near the rack in an adjoining area. He came up to me said said, "Sometimes I think we got too much help around here." I didn't reply. He repeated it several times and I still didn't reply, so he walked on to Diane Haime who was by the wrapping machine and he repeated the same words again several times and she did not reply. So, he stood there for awhile and then I said to him that I would go home because I didn't want Wayne Schlotte to go home because he came from Whitewater to work and I thought he was referring to him as going home. So, he said OK. So, I left at 6:00 o'clock.

Q. Was that the end of the conversation?

A. Yes.

Q. Directing your attention to the next morning at 8:00 o'clock, did you have another conversation with Tom Kozel?

A. Yes, I did.

Q. What happened?

A. As soon as I came to work he came up to me and asked me if I worked last night and I said I didn't. He said, "Why didn't you?", and I said "Because you agreed that I could go home." He said he didn't. I said, "You can ask Diane Haime because I asked her to particularly remem-

ber," because I anticipated he would use this as an excuse the next morning. He said, "I don't care what she heard, who do you think you are that you can set your own
 66 time?" He said, "Ed Kallas, I could fire you for this." Then he went on and said that the reason why I was doing this is because I was ashamed for what I had done to the store. He says, "Who do you think you are, some kind of angel? Who are you trying to protect? You'll have to live with this for the rest of your life." I said, "My conscience is free."

Q. About how long did this conversation take?

A. It took several minutes because he would only say a few sentences and then go off and come back again at me.

Q. Was anybody else present?

A. Tom Horner and Wayne Schlotte were nearby.

Q. Directing your attention, Mr. Kallas, to the same day, March 12, about 1:00 p.m. in the storage area, did you have further conversation with Tom Kozel?

A. Yes, I did.

Q. What was that conversation?

A. He said, "Are you talking to the boys about the union in the store?", and I said, "No." He says, "I don't care what you do away from the store, but not in the store, OK?" And I replied, "OK."

Q. Was anybody else present?

A. No.

Q. How long did this conversation take?

A. A minute or so.

67 Mr. Mueller: Miss Examiner, do I need to object to that last testimony relating to what was said about no solicitation?

Trial Examiner: What?

Mr. Mueller: Do I need to object to the evidence which was——

Trial Examiner: I don't know. I don't know whether you think you need to object or not.

Mr. Mueller: I'm just wondering if you understand that any evidence or testimony that's solicited by General Counsel relating to things that are admitted we obviously think are not relevant.

Trial Examiner: I said you have a continuing objection.

Mr. Mueller: That's why I asked. Do I need to object to that?

Trial Examiner: If you have no specific objection to this question you don't have to object.

Q. (By Mr. Selby) Mr. Kallas, the record will show that the Charging Party in the instant case filed an election petition on February 21st, and that there was a demand for recognition by the Charging Party of the Respondent on February 14, 1966.

Now, subsequent to those days, let's say from the middle of February to the time you quit, were there any incidents involving spoiled food in the produce department with Mr. Kozel?

68 A. There was always this, all the time, but after they were notified of the union it only increased constantly.

Q. All right. What did this consist of generally?

A. Please?

Q. What did this consist of generally if you can recall?

A. Well, I didn't do anything right anymore, and he found fault with everything that was being done. I was no longer spoken to decently and as a matter of fact, I wasn't spoken to at all.

Q. By whom?

A. Tom Kozel.

Q. What were some of the matters which he discussed with you concerning the produce department?

A. Matters that should have been discussed weren't. The only thing was the faults. I didn't know what was going to be in the paper, the sales, I wasn't told, I was never spoken to. If I said "Good morning" I was never answered. I was only found fault with, talked to in a harsh way, continuing more so and more so, and finally I quit.

Q. Were there more problems with spoiled fruit and vegetables?

A. Yes, that increased, everything increased each day.

Q. All right. Directing your attention to the day you quit, April 7, 1966, did you have a conversation with Otto Stahl?

A. Yes, I did.

Q. Who's Otto Stahl?

A. He's the assistant manager of the store.

69 Q. Was anyone else present?

A. No.

Q. What was said in this conversation?

Mr. Mueller: Objection.

Trial Examiner: Basis for the objection?

Mr. Mueller: Hearsay. Stahl's not a representative.

Trial Examiner: Assistant manager of the store?

Mr. Mueller: He's part of the unit.

Trial Examiner: Is Stahl a member of the unit?

Mr. Selby: He's in the unit, but all I'm asking, Miss Trial Examiner, is what's the difference what has status is?

Mr. Mueller: Anything Mr. Stahl says doesn't have any affect on us.

Trial Examiner: Objection sustained.

Mr. Selby: Miss Trial Examiner, could I have the witness testify to what he told Mr. Stahl?

Trial Examiner: He can testify to his statements, yes.

Mr. Selby: All right.

Q. (By Mr. Selby) Mr. Kallas, would you please tell us what you told Mr. Stahl during your conversation with Mr. Stahl?

A. Yes. I told him, Otto Stahl, that I was quitting at five o'clock because I was of ill health which was brought about because of pressure that was put on me because of the union in those weeks and I could no longer take it. I was sick.

Q. Was this a fact?

70

A. Yes.

Q. What had transpired? You say you were sick?

A. My nerves were all——

Q. What had happened? Were you working every day?

A. I didn't work that week, Monday, Tuesday, or Wednesday, and then I quit on Thursday and the following week I didn't work. I said it was no longer worth while fighting for to keep my job.

Q. Mr. Kallas, directing your attention back to your conversation with Mr. Kozel concerning your break up in the break room on the lunch hour——

A. Yeah.

Q. ——will you tell us whether at the time you had the conversation it was your regular lunch hour or break time?

A. Yes, it was my regular break time and also it was my regular lunch hour.

Q. And how long had you had these periods for break and lunch hour?

A. Well, I usually carried about the same lunch hour and break period all the time I was there.

Mr. Selby: I have no further questions of Mr. Kallas at this time.

Mr. Loeffler: The Charging Party has none.

Mr. Mueller: May I request a short recess of a few minutes?

71 Trial Examiner: Fine. Five minutes.

(A short recess was taken.)

Trial Examiner: On the record.

Mr. Mueller: I have no questions of Mr. Kallas. However, I would have the record show that during the off-the-record discussion that I had with counsel for Charging Party and General Counsel that they stated they have no opposition to the marking and introduction or offer for introduction of certain exhibits at this time, and notwithstanding the fact that it is out of order.

At this time——

Trial Examiner: You may step down.

(Witness excused.)

Mr. Mueller: I would also indicate that these are xerox copies of the originals and I would assume there's no objection to the xerox copies.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Mueller: Respondent's 9, I only have one copy of it. I'll offer it and then withdraw it with permission from the Trial Examiner and make copies.

I offer Respondent's Exhibits 5 through 9.

(The above-mentioned documents were marked for identification as Respondent's Exhibits 5 through 9.)

72 Trial Examiner: There being no objection——

Mr. Selby: Wait. We do have objections some of these documents.

Trial Examiner: Since there's going to be an objection, will you, Mr. Mueller, please offer them and identify them, please?

Mr. Mueller: OK.

Trial Examiner: Possibly it would be easier if you offered them one at a time.

Mr. Mueller: Respondent's Exhibit 5 is a letter addressed to Mr. Peter Voeller, dated February 16, 1966, from myself. This letter, as is indicated by its contents, is in reply to the union's demand letter. I offer Respondent's Exhibit 5.

Mr. Selby: General Counsel has no objection to Respondent's 5.

Trial Examiner: Mr. Loeffler?

Mr. Loeffler: I have no objections.

Trial Examiner: Respondent's Exhibit Number 5 is admitted.

(Respondent's Exhibit 5 for identification was received in evidence.)

Mr. Mueller: Respondent's Exhibit 6 is a May 12, 1966 letter from the store manager, which isn't indicated on this exhibit but being Tom Kozel, addressed to Mr. Edward Kallas offering him reinstatement and Respondent's Exhibit 6 is offered.

Mr. Selby: The position of the General Counsel who

73 has in his possession Respondent's 6, 7, and 8 and has seen Respondent's 9 would be the same with respect to all those documents, namely, that they have no right to be introduced in this hearing. They have no probative value, they're of no concern to the Trial Examiner. These are strictly matters for compliance and are matters which should be handled if and when there is a determination that Respondent has violated the Act. All these documents serve to do is clutter the record and there's no reason whatsoever why any matters relating to settlement, settlement discussions, amounts paid to any 8-3's or alleged 8-3's, should be included in this record. These are all matters which normally are within the province of the parties pre-hearing discussions or extra-hearing discussions and should be no part of a hearing, particularly a "C" case hearing, where these are various issues which are being litigated.

Trial Examiner: Mr. Selby——

Mr. Selby: If matters such as this, namely settlement, are allowed into "C" cases and proposed settlements and those discussions, it's going to make settlements in other cases extremely difficult.

Trial Examiner: Mr. Selby, do you believe they are relevant to a defense of mootness?

Mr. Selby: Not at all, Miss Trial Examiner.

Trial Examiner: Mr. Mueller, what's your position on that?

74 Mr. Mueller: Well, as indicated——

Trial Examiner: For what purposes are you introducing them?

Mr. Mueller: As indicated by your question, the Respondent's Exhibits 7, 8, 9, and 6, which have not been identified on the record yet, all relate to the paragraph 3 of our Amended and Supplemental Answer.

Trial Examiner: Mr. Selby, do you——

Mr. Selby: We objected originally to the Answer and we're maintaining that same objection, and that's part and parcel of the present objection to matters which are extra-hearing matters, to documents which refer to settlement discussions and offers of settlement, these have no bearing whatsoever on the issues and allegations raised by the Complaint.

Trial Examiner: Are you prepared to stipulate there was an offer of reinstatement on the date stated in the Answer?

Mr. Selby: Yes.

Trial Examiner: With that stipulation and my understanding that these documents offered by Respondent are directed toward that fact, I will exclude the documents and I assume Mr. Mueller wants an objection noted.

Mr. Mueller: Well, I just except to your ruling. Is it possible to stipulate with respect to Respondent's Exhibit 9, which is a cancelled check in the amount of \$41.28?

Mr. Selby: We maintain the same objection. Number 75 one, it's not material herein; number two, in any event the Board would not be bound by any check which has been paid.

Mr. Mueller: I'm not offering it for that.

Trial Examiner: Gentlemen—Mr. Selby, are you willing to stipulate as a fact without any question to the legal connotation or legal meaning or effect, that the company did send Mr. Kallas a check for the amount stated in the Amended Answer?

Mr. Selby: We would so stipulate.

Trial Examiner: All right, it is so stipulated. The exhibits are excluded. The stipulation is on the record and the legal effects, if any, of those facts can be argued either orally if you gentlemen want or probably better by briefs.

(Respondent's Exhibits 6, 7, 8, and 9 were rejected.)

Mr. Mueller: Will they be in the rejected file?

Trial Examiner: They'll be in the rejected file.

Mr. Mueller: May I probe on further stipulation, and that is, in response to the stipulated offer that was just made that Kallas refused on the date as alleged in the Answer?

Mr. Loeffler: Refused reinstatement?

Mr. Mueller: That he refused this offer, this offer that was stipulated to.

Trial Examiner: Reinstatement and the check?

Mr. Mueller: No, just that, as alleged in our Answer, that he refused on May 14, 1966, this offer which has
76 been stipulated to. We don't have them in as exhibits.

Trial Examiner: I state only as a fact without conceding relevance or effect——

Mr. Selby: Let me say this, Miss Trial Examiner, and I'm as interested as anybody in keeping this record as short as possible, this information has no bearing whatsoever on this case and yet it's causing additional testimony to go into the record.

Trial Examiner: Mr. Selby, will you——

Mr. Selby: Which we're trying to avoid. Now, this is cost not only to the government but to the Respondent.

Trial Examiner: And the more we argue on it the more it's going to cost. Will you stipulate the fact without any concession as to relevancy or effect, legal effect?

Mr. Selby: For purposes of brevity of the hearing, I will so stipulate.

Trial Examiner: Fine. Now, let's proceed.

Mr. Mueller: One other item which I probably should have taken up when you introduced the matter to me, and that is, Respondent wants to make it clear that we move the Trial Examiner dismiss the charges which were filed by the union, the objections to the election, because they were not timely filed and were not in the form or substance required by Section 102.69 of the Board's Rules and Regulations.

77 Trial Examiner: That's in your pleadings, and as I stated, it's not been ruled on at this time, being denied for the purposes of this hearing so we can get a complete record.

Mr. Selby, any more?

Mr. Selby: Yes. I call Diane Haime.

Whereupon,

DIANE HAIME

was called as a witness by and on behalf of the General Counsel and, after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Selby) Please give us your name and address, spelling your last name?

A. Diane Haime, H-a-i-m-e, my address is 2259 Alabama Avenue, Forrestal Village, Great Lakes, Illinois.

Q. It's Mrs. Haime, is that right?

A. Yes.

Q. Could you give us your age, please?

A. 25.

Q. Did you work for the Zinke's Food Stores in Beloit?

A. Yes.

Q. What period of time did you work there?

A. Approximately the middle of January to April 7, 1966.

Q. Mrs. Haime, directing your attention to March 11, 1966, were you present during a conversation or in a nearby area during a conversation between Mr. Kozel and Mr. Kallas at the Zinke's store?

78 A. Yes.

Q. Where did this conversation take place?

A. In the back part of the store where we do the wrapping and bagging of vegetables and foods.

Q. All right, what happened at that time?

A. If I have the right date in mind, he said that we had too much help.

Q. Who's "he"?

A. Mr. Kozel. He said I sometimes think we have too much help around here. He said it once or twice that I heard, but I made no reply. Now, if this is the same date, there's a few days I'm not too clear on.

Q. Now, directing your attention to possibly a day before that time, were you present when this incident involving the broccoli was discussed?

A. Yes.

Q. All right. Will you tell us what happened there?

A. I was standing out there in the back part of the employee's department—the produce department, that is, and Mr. Kozel brought a package of broccoli back out and I heard him tell Ed Kallas that it wasn't fit to be out there for customer use, to take it home and cook it himself.

Q. What, if anything, was done with the broccoli?

A. Well, as I recall, it was more or less thrown down on the counter and Ed had to step back.

79 Q. Ed Kallas had to step back?

A. Yes.

Q. Why'd he have to step back?

A. Well, he would have been directly in line of it, practically.

Q. You mean he would have been hit with the broccoli?

A. More or less, yes. I was seeing this out of the corner of my eye, I wasn't looking directly at them because I didn't figure it was any of my business.

Q. Did incidents like this ever happen before?

A. Off and on, yes.

Q. And would you describe them for us, as best you can recall?

A. Oh, vegetables or fruit wouldn't be up to what Mr. Kozel thought should be out in the display rack and he would bring them back and tell Mr. Kallas that they shouldn't be out there, they were garbage and should be thrown away.

Q. Now, the union requested recognition on February 14th and we have it in the record, evidence right now, that a letter was received by the Employer on the 15th and a petition was filed on the 15th of February, 599. Did you notice anything different with respect to finding spoiled goods before and after that date, the middle of February?

A. Well, it seemed to me after the cards were circulated were sent around, that we were to sign whether we
80 wanted a union to negotiate for us for better working conditions, were around in the store, after they came out, that he seemed to find more fault with things on the display case, with Mr. Kallas.

Q. You mean that occurred before?

A. Not a lot, no.

Q. Are you telling us it was a matter of degree, that it was done more often, or what?

A. Yes, it was more often after I would say the word of union was out.

Q. Now, what were some of the specific instances that you can remember involving the produce department and what may have been said to you or other people working around you by Mr. Kozel?

A. Things would be on the case that Mr. Kozel wouldn't think should be there, so the next day we would try extra hard to take any of these things that we thought maybe they were too bad or would be turned back during the day, and if they weren't real bad we would put them on this reduced cart. Well, many times he would go around and he'd take them off the reduced cart and say they weren't that bad, they could go back on the case again. So, we never knew just what should be taken off and what shouldn't be.

Q. Mrs. Haime, directing your attention to March 15 in the afternoon about two p.m., did you have a conversation with Tom Kozel in the store?

81 A. Not in the store, no.

Q. Did you have a conversation with him?

A. Yes.

Q. All right, next door?

A. Yes.

Q. To the grocery store?

A. Yes.

Q. All right. Where did this take place?

A. I believe it's called the Calico Cat, it's a restaurant, and we sat at a table and we talked about that the store wasn't making a lot of money.

Mr. Mueller: Objection. This matter's not in issue.

Trial Examiner: Objection overruled.

The Witness: That the store wasn't making that much money and they didn't feel at the time that if we got a union in that we would be able to have these increases in

benefits and that there possibly could be a reduction in hours and full-time help which would naturally cut our wages. We wouldn't get as much money if we weren't working as many hours.

Mr. Mueller: May I ask leave of the Trial Examiner to request General Counsel to state for what he offered that?

Trial Examiner: I think it's obvious. Mr. Selby?

Mr. Selby: It's part of the 8-1 allegations.

Mr. Mueller: That's my objection. There is no 8-1 issue.

82 Mr. Selby: Do you see this anywhere in the stipulations?

Trial Examiner: Just a minute, no colloquy, please.

Is this different from the problem we've already been through?

Mr. Mueller: May I have an understanding that was offered to prove an 8(a)1 allegation? What part of the Complaint was that offered to prove, Mr. Selby?

Mr. Selby: I'm not being interrogated here. The witness is on the stand. I'm not going to answer your questions.

Mr. Mueller: May I ask leave of the Trial Examiner to ask General Counsel? He stated on the record that was part of the 8(a)1 allegations. I would like to know what part of the Complaint it tends to prove, if I may?

Trial Examiner: Mr. Mueller, I think we've been through this before. As I said——

Mr. Mueller: Are you denying my request?

Trial Examiner: May I finish? As I've stated, as I see the issues not stipulated in this case, there's an 8(a)5 issue which depends on whether 8(a)1 conduct dissipated a union majority established previously, and on that basis I am admitting this evidence.

Mr. Mueller: Notwithstanding General Counsel's assertion?

Trial Examiner: I have explained the basis on which I am admitting it and you have an objection. Mr. Selby,
83 you may proceed.

Mr. Selby: No further questions.

Mr. Mueller: No questions.

Mr. Loeffler: I have no questions.

Mr. Mueller: May I ask leave of the Trial Examiner to ask General Counsel if he has any more evidence to offer with respect to paragraph 6 of the Complaint?

Mr. Selby: Yes.

Trial Examiner: Let's get on with the hearing and see what comes up.

You're excused.

(Witness excused.)

Mr. Mueller: I want to try and prevent, Miss Examiner, subjecting my client to sitting here and listening to evidence that we feel is totally irrelevant on any basis, even the basis that you feel it should come in on, and all we're doing is sitting here listening.

Trial Examiner: Mr. Mueller, I hardly consider that a great hardship.

Mr. Mueller: Well, it just might be.

Trial Examiner: Will you proceed, Mr. Selby?

Mr. Selby: Miss Trial Examiner, I can't proceed any further because I've asked that witnesses be made available and they're not here just yet. I assume they're on the way. They're working for the Respondent.

84 Mr. Mueller: Which witnesses?

Mr. Selby: Saladino and others.

Mr. Mueller: May we go off the record?

Trial Examiner: Yes, you may.

(Discussion off the record.)

Trial Examiner: On the record.

As I understand it, Respondent is willing to stipulate to a finding that the union had a majority in the unit on the demand date. Is that stipulated first?

Mr. Mueller: That's a finding that's within your power, Miss Examiner.

Trial Examiner: The question was, is Respondent willing to stipulate that such finding could be made with objection or exception on this record? If the answer to that is "no" we're just going to have to have some more evidence and Mr. Selby has a right to put in whatever he thinks is necessary.

Mr. Mueller: Miss Examiner, to that question I can only say due to the posture of our Supplemental Answer we cannot answer that yes, because of paragraph 6 of our Answer.

Trial Examiner: Only because of paragraph 6?

Mr. Loeffler: The Amended Answer?

Mr. Mueller: Yes, the Amended Answer supplants the original Answer.

Trial Examiner: I asked this question to which I think a simple "yes" or "no" answer is possible, Mr. 85 Mueller, and that is, is Respondent at this point prepared to stipulate that as of the date the union demanded recognition the union had a majority in the appropriate unit? I'm simply asking if that is stipulated, yes or no?

Mr. Mueller: The basis of the cards that were introduced, General Counsel's Exhibits 7(a) through (p), Respondent would stipulate that they had a majority of the employees signed on February 14th, but, however, realleging that Respondent had a good faith doubt and could have that, whatever that status was, tested in a certification election.

Trial Examiner: I'm trying to get to these one at a time. Would you stipulate that on the demand date the union had a majority?

Mr. Mueller: They had 16 out of 26 cards signed.

Trial Examiner: They represented a majority. Paragraph 6 of the Answer then says Respondent alleges that Respondent has never been obligated to recognize and bargain with the union. I understand that is because of your assertion that the company had a good faith doubt.

Mr. Mueller: That's correct.

Trial Examiner: And that's one factual issue open, is that correct?

Mr. Selby: Yes.

Mr. Loeffler: Yes.

86 Trial Examiner: Then you still, as a matter of fact, deny that conduct of the Respondent after the demand date undermined the union's majority. Is that denied as a matter of fact?

Mr. Mueller: Yes, that would be denied.

Trial Examiner: As a matter of fact, as a matter of evidenciary proof, not simply as a matter of law arising from a lost election?

Mr. Mueller: Well, what was that, your last statement?

Trial Examiner: You are not at this point basing your position on the fact or your contention that the union's objections to the election were late, I'm talking about a

straight matter of fact. You deny that conduct of the Respondent undermined the union's majority after it was established?

Mr. Mueller: As a matter of fact and not as a matter——?

Trial Examiner: Not as a matter of law, I'm not interested in matters of law, that's right, putting that aside.

Mr. Mueller: Involving the filing of the objections?

Trial Examiner: Yes, putting that aside.

Mr. Mueller: With respect to your last question, the answer will be "no".

Trial Examiner: I forget how the question was worded.

Mr. Mueller: In other words, we won't admit that we consciously engaged in conduct which was designed to undermine whatever the status was.

Trial Examiner: Well, then, will you please tell me why you say your clients don't want to sit here and
87 listen to proof?

Mr. Mueller: Because you can make a finding from——

Trial Examiner: I say, we will proceed with the hearing.

Mr. Mueller: I expected that.

Trial Examiner: I had hoped we could get down, and I had assumed that on the basis of this record, you would agree and we would have a clear question that your legal position, as I understand it, is simply because the union filed its objections, as you contend, too late you have no obligation to bargain and if you say that there are other issues in the case then General Counsel, whether your clients like to listen to evidence or not, is going to be able to put in whatever evidence he feels is necessary to meet the unspecified factual issues you maintain are in the case.

Mr. Mueller: Well, you state our position correctly with respect to the legal issue and as to the other issue, our only response is that allegations were made as to 8(a)1 and the allegation was made as to some 8(a)5. The legal inference to be drawn doesn't depend upon the color, so to speak, of whatever testimony you're going to deduce.

Mr. Loeffler: That's absolutely incorrect.

Trial Examiner: I believe we had better stop. I am ruling, and I want no further argument on this point, I'm ruling that the General Counsel may put on whatever other evidence he believes is necessary to support his position with simply general denials on the part of the Respondent. The General Counsel can put on whatever he feels is necessary to warrant inferences.

Continue, please.

Mr. Mueller: As long as the record shows that we object and your objection would overrule——

Trial Examiner: I understand you object.

Mr. Mueller: And the continuing exception.

Trial Examiner: To the General Counsel's supporting of my drawing of inferences.

Mr. Selby: Miss Trial Examiner, I can only repeat what I stated earlier, that we have two witnesses under subpoena. We explained and agreed with Mr. Mueller that we would not want to shut down the grocery store and have all those people here, so as a consequence we let them continue working until we needed them. Now, I asked for these people about an hour ago and they're not here now so we're going to have to proceed out of order with Mr. Loeffler's part of the case, I believe, rather than wait for them.

Trial Examiner: Mr. Mueller, do you have any idea when they will show up?

Mr. Selby: It's Audrey Bunker and Doris Saladino.

Mr. Mueller: Twenty minutes, half an hour, I don't know.

Mr. Loeffler: We can proceed with one witness out of order.

89 Trial Examiner: Well, let's proceed with one witness and then see where we go, because when a witness does not honor a subpoena I'm prepared to allow secondary evidence.

Mr. Mueller: It's not a question, I appreciate your stern position there, but actually it's uncalled for because I don't think you understand the posture of this, it's not a question of a witness not responding, it's a question of he asked about an hour ago and we didn't know if it would be necessary. It now obviously is necessary and we'll call them. I'd like to know who he wants so we can call them.

Trial Examiner: I thought he said he'd asked for them an hour ago.

Mr. Mueller: Is it all right if I've forgotten who they were?

Mr. Selsby: No, I also mentioned them on the record.

Mr. Mueller: Fine. Who were they?

Mr. Selby: Could I please have Doris Saladino and Andrey Bunker.

Trial Examiner: Mr. Selby, while they're arranging to get witnesses will you proceed with the witnesses they have, I mean, you have?

Mr. Selby: I have no further witnesses.

Mr. Loeffler: We'll call Mr. Moreth.

Whereupon,

WILLIAM A. MORETH

90 was called as a witness by and on behalf of the

Charging Party and, after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Loeffler) State your name, please?

A. William A. Moreth, M-o-r-e-t-h.

Q. And would you state to the Trial Examiner what your present occupation is?

A. Secretary-Treasurer and Business Representative of Local 1401, Retail Clerks Union.

Q. One of your primary responsibilities is to negotiate and administer collective agreements, is it not?

A. It is.

Q. And in what geographical area generally do you perform this function?

A. Beloit, Janesville, Madison, those are the principal centers.

Q. Could you roughly state to the Trial Examiner what the radius in terms of miles of this area is?

A. Janesville is about ten miles north of here, a city of approximately the same population. Madison is fifty miles, fifty one miles, and is a larger city.

Q. Could you state briefly with how many employers you have collective agreements that you are personally responsible for the administration of?

A. Do you mean just food store contracts now?

91 Q. Yes sir.

A. Ten or twelve, at least.

Q. Of these, how many of them—you've been here today and heard the testimony today that there are approximately 26 employees at Zinke's—how do these businesses compare in terms of the total number of employees involved?

A. Well, when I have a contract with, for instance, one

employer, that employer may have only one store or he may have as much as 10 or 15 stores. We have many individual stores of this size. The twenty to thirty members in a food store is a general rule.

Q. That, you say, is the general rule?

A. Is the average, a few larger, a few smaller, but the most of them run about that size.

Q. Let me show you this document which we'll mark as Charging Party's Exhibit 2 and ask you to describe to the Trial Examiner what that is?

(The above-mentioned document was marked for identification as Charging Party's Exhibit 2.)

A. This is a copy of what the area contract is, with the employers in this immediate, what is known as this immediate area, the Janesville-Beloit area.

Q. When you say "contract", this is a specific item of that contract, is it not?

A. Yes.

92 Q. What is it?

A. The wage schedule.

Q. Now, what kinds of businesses is that schedule in effect?

A. Food stores.

Mr. Mueller: May I ask, by way of objection, what this is relevant to?

Trial Examiner: Mr. Loeffler's answered that several times in the course of the hearing. The remedy he's asking for.

Q. (By Mr. Loeffler) I'm sorry, sir, I didn't hear your answer. You said that's in effect in food stores?

A. In food stores in this area, the Janesville-Beloit area.

Q. Is it in effect in that class of food stores you have described, between twenty-six and thirty employees?

A. Mostly, yes.

Q. Could you elaborate on your response when you say "mostly", would you say in the average store?

A. In the average store, we have maybe one or two stores where there would be ten or twelve employees and there may in one store, I think, be as high as in the forties. But, the bulk of them run in the twenty to thirty members in food stores in this area.

Q. Assuming that you're getting your first contract in a food store, how long does it normally take from recognition or certification to the execution of the first contract?

93 A. From recognition until the first contract?

Q. Yes.

A. From recognition, three or four months at the most, from date of recognition. Now, our campaign starts much sooner than that.

Q. What do you understand the word "recognition" to mean, sir?

A. When we are officially recognized by the employer as the sole and exclusive bargaining agent for the members, for the employees that work in his store.

Q. The time span between that and the execution of the contract is how long again?

A. Three or four months from date of recognition. That's the most, usually, that we run into. It can be executed much faster from date of recognition.

Q. Now, turning your attention to that document before you, those wage schedules are on a progression rate, are they not?

A. Yes.

Q. And is it fair to say that in the stores within your

jurisdiction the beginning rate on the progression is the lowest wage rate received by anyone organized by you in this area?

A. The absolute minimum.

Mr. Loeffler: How, Mr. Mueller, do you have the —

94 Mr. Mueller: List?

Mr. Loeffler: Yes.

That's all the questions I have from this witness.

Trial Examiner: Aren't you going to offer that?

Mr. Loeffler: Oh, I'm sorry.

Mr. Mueller: I haven't seen it.

Mr. Loeffler: Let's give this one to Mr. Mueller. I'll give you a copy, too.

Mr. Mueller: May I ask if you're offering this exhibit solely for the back piece of paper that's stapled on?

Mr. Loeffler: Correct: You can take it off right now if you want.

Mr. Mueller: And all you want is the wage scale?

Mr. Loeffler: Yeah.

Mr. Mueller: Well, I would object to his whole line of questioning as well as to the exhibit, as to relevancy because nowhere in the Board's policy or Board law is the type of remedy that's being requested by the Charging Party, never been determined as such, and I would say it's irrelevant.

Trial Examiner: Objection overruled. The remedy is a matter of discretion, and I assume Mr. Loeffler will present some argument in an attempt to persuade me and/or the Board to adopt his view.

Mr. Mueller: Further then with respect to the particular document itself, I would object as to improper founda-

95 tion and I would guess authenticity for what it represents.

Trial Examiner: You may cross examine Mr. Moreth on that as you like, as to the document and its authenticity.

CROSS EXAMINATION

Q. (By Mr. Mueller) Mr. Moreth, this document which is marked as Charging Party's Exhibit 2, has this piece of paper stapled on the back page. Where'd that come from?

A. From the original contract. That's a printed contract that covers all of the employers, all of the stores that are organized are on that exact same contract, exact same wage schedule, and individual documents are signed with each employer. For the sake of work in our own office in making it smaller and easier to handle, we had a contract printed. The wage schedule was of such size that we had to do it in two stages.

Q. From your answer I'm assuming that this back page, we'll call it, which is the mimeographed sheet of paper that's stapled on, that this comes from a contract that pertains to a multi-employer unit, is that correct?

A. I don't think I understand that question, Mr. Mueller.

Q. Well then, let me ask, do you know what a multi-employer unit is?

A. As such, when we deal, I'll explain it as I understand your question and then I'll explain in an answer, we deal with employers. The employers all sit on one side of the table and the union sits on the other, and there is not a
96 signed agreement between those employers where they will hire you to negotiate their contract. If I understand it, my interpretation of a multi-employer unit—

Q. These employers that sit across from you, they're all different and separate employers without any corporate ties? A&P—

A. A&P, Kroger, Piggly Wiggly, National, Super Value,

independents, they all sit there. We bargain with them all at the same time.

Q. And am I to conclude then that in the Beloit area you bargain with all the units that you represent in this area, all on that same basis?

A. Yes.

Q. Is it also true then to conclude that you do your bargaining all at one time and you do not bargain separately with an employer?

A. With the employers at this bargaining unit we do not bargain separately. With an employer such as this one where we'd negotiate a first contract, obviously, we'd have to negotiate with him on an individual basis.

Q. Oh, in other words, you're changing your testimony? You say there are stores in the Beloit area that you negotiate contracts for that do not bargain in this manner you described?

A. No, I'm not changing my testimony, Mr. Mueller. I said when we organize a new store and it's during the
97 middle of the existing agreement with the other employers, we'd have to negotiate with this employer the first time on an individual basis. That is, until he then becomes part of the employers on the other side of the table.

Q. What would happen if he doesn't want to become part of those employers? Does he have to? Do you know?

A. No, that's a point in negotiations which we can't decide here today.

Q. Do some employers refuse to be part of that group?

A. We have none separate as of now. They're all covered in the area agreement.

Q. Is it possible that some employer would refuse to bargain on that basis as a group?

A. I can honestly say I don't know.

Q. How long have you been in this area?

Mr. Loeffler: I think you're beyond the voir dire of the document. I haven't finished my direct examination of this ~~trial~~.

Trial Examiner: Excuse me. I understood you had.

Mr. Loeffler: I'm sorry. I think I left out some questions. If you want to finish the cross examination, I can do it on redirect, that's no problem. Go ahead.

Mr. Mueller: All right. I thought you were finished with direct.

Trial Examiner: I understood you to say you were through.

Q. (By Mr. Mueller) This sheet of paper, this back
98 sheet, is then from this contract, from this group of employers that all have contracts with your union?

A. Every employer in this area is on that exact same wage schedule. If you went from one store to the next and they're covered by union contract, they'll receive the exact same wage.

Q. Who determines that wage? Did the union just say this is the wage schedule you're going to have to pay?

A. This is a point that the employers and the union negotiated.

Q. Well, specifically, what employers have negotiated and agreed to this figure?

A. A&P, it would be Mr. Melowitz; Kroger, Mr. Van Ausdale, out of Cincinnati, I believe; National is Mr. Costello; Piggly Wiggly is Mr. William Rose. There would then be the independents, Super Value—

Q. Do they negotiate at the same time?

A. They are negotiated at the same time.

Q. They sit in with A&P and Kroger?

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Q. Do they negotiate at the same time?

A. They are negotiated at the same time.

Q. They sit in with A&P and Kroger?

A. They're invited. They generally only sit in about half the time.

Q. Well, how does it come about that whatever the wage schedule that's represented on this back sheet is agreed to by the others that don't sit in?

A. They are generally there for the key or more important meetings. The first meeting or two is not considered as one of the more important meetings.

Q. Does your union have any wage schedules that do not conform to this back page? In other words, as of 4/17/66 and 10/16/66 and 4/16/67?

A. In other areas, for instance Madison or Sun Prairie, it might vary one penny or two tenths of one penny or a very small amount.

Q. Well, let's say in the Beloit area, are there any contracts that you have secured from employers in this area that vary for instance from this back page schedule, wages?

A. In Beloit or Janesville they are under the same exact same contract, every employer that's under contract is on that wage schedule right there.

Q. In other words, every one—the first column went into effect April 17, 1966, and the next one went into effect October 16, 1966 and so forth?

A. (Witness nods head.)

Q. How is it you pay males and females different wages?

Mr. Loeffler: I object on the grounds of relevancy.

Trial Examiner: Don't you want to enforce the Civil Rights Act?

Mr. Loeffler: I'm going to advise him of his privilege against self incrimination.

The Witness: I'll answer if you want an answer.

Mr. Mueller: That's all right, sir.

100 Q. (By Mr. Mueller) Does every store then have a head cashier and bookkeeper?

A. Some stores refer to the girls as head cashier, some refer to them as a bookkeeper. We put it in there. The volume of the store might depend on that. But, there is one person in the pay scale that's negotiated for that person.

Q. Now, you mentioned Kroger's, A&P, Kohl's, anybody else in the Beloit area? Piggly Wiggly?

A. Piggly Wiggly, A&P, Kroger, National, Super Value, Woodman's.

Q. Who's that?

A. Woodman's, an independent that belongs to the same distributor that your employer does, Roundy's.

Mr. Mueller: Do I understand you're not offering it for the rest of this?

Mr. Loeffler: No.

Mr. Mueller: Well, I'll still object as to relevancy.

Trial Examiner: The exhibit is admitted.

(Charging Party's Exhibit 2 for identification was received in evidence.)

REDIRECT EXAMINATION

Q. (By Mr. Loeffler) Are there any other dimensions to the economic package in these collective agreements besides base wages?

A. As far as economics go, there's definitely a big thing nowadays, and that health and welfare insurance benefits.

101 Q. Is that a total employer contribution in this group that we've been talking about?

A. All of the employers contribute to the same insurance fund, yes.

Q. How much?

A. Sixteen dollars per month per member for each employee that works twenty four hours or more per week.

Q. Now, when you're speaking about these joint negotiations, there isn't an arrangement whereby each employer has a contract with the other employer to be bound by the outcome of those negotiations, is there?

A. Not to my knowledge.

Mr. Loeffler: I have no further questions of this witness.

Trial Examiner: Mr. Mueller?

Mr. Mueller: One second.

Mr. Loeffler: I'm sorry, I do have one other questions.

Q. (By Mr. Mueller) You made reference to Roundy's distributors whom you have under contract. Is there any other business in this immediate geographical area other than Woodman's who's a Roundy distributor and under your contract?

A. C&P groceries.

Q. Where's that located?

A. Madison.

Mr. Loeffler: That's all.

102

RE CROSS EXAMINATION

Q. (By Mr. Mueller) Mr. Moreth, these wages that are on this schedule, would it be your testimony then that when you organize an independent store, say a small store, that you would give them this wage schedule and say this is the wages that you're going to have to pay? Is that your testimony?

A. I haven't testified to that, no.

Q. Well, would that be your testimony?

A. Do you mean do I just throw them a contract and say pay it immediately?

Q. Let's make an assumption. You organize the employees of a small grocery store——

A. What is small?

Q. Let's say twenty, they're an independent store, independently owned, they recognize you voluntarily or through an NLRB election, and because of your certification you sit down at the bargaining table. Am I to understand then that you throw them across the table this, Charging Party's Exhibit 2, the schedule of wages and say this is the wages you're going to have to pay?

A. No. First of all, I have to clarify that twenty is not a small unit. It's an average unit. Secondly——

Q. Well, would you bargain about that? Would you negotiate these wages?

103 Trial Examiner: Mr. Mueller, he's trying to answer your question.

Mr. Mueller: I'm satisfied with the answer.

Would you negotiate if the employer said, "No, I can't pay these and I'm not going to pay those wages," would you negotiate that item?

The Witness: This is the point I'm trying to explain, Mr. Mueller.

Q. (By Mr. Mueller) Yes or no, would you negotiate that item?

Mr. Loeffler: I think he can elaborate on the answer. You're asking him——

Mr. Mueller: You have rebuttal.

Yes or no, would you negotiate those wages?

The Witness: It is a point of negotiation.

Q. (By Mr. Mueller) In other words, it's possible that if an employer, if you organized an employer in this area

and he said, "I'm not going to pay \$2.008 per hour or \$80.30 a week for my male employees who have been employed for zero to six months," would you then negotiate that and consider a counter offer from him if he said, "Well, how about \$70.30." Would you consider that?

A. That is a point of negotiations, and the way you put it it is a counter proposal.

Q. And to reach an agreement, would you possibly agree to a wage scale less than this in this area?

104 A. I tried to elaborate on my answer before. Can I do it now?

Q. I'm asking the question, yes or no, if a newly organized independent grocery store with about twenty employees extended recognition to you and you were bargaining and negotiating for a first contract and you presented them this, Charging Party's Exhibit 2, this Schedule A, Wages, and he said, "No, I can't afford to pay that, but I'll pay, for instance, for full time, zero to six months employment, I'll pay \$70.30," would you negotiate on that item? Yes or no?

A. We're still negotiating at that point, yes. When we organize——

Q. Is it true to say, then, that you would agree to something less than this Schedule A, Wages, in order to reach an agreement, a contractual agreement with that employer, a labor contract?

A. I would have to give a reserved answer to that, if I can explain what I'm trying to explain.

Q. Well, either you would or you wouldn't. In other words——

A. I'll give you——

Q. If you wouldn't, is it true then——

A. I'm not——

Q. —that you'd just go on strike?

A. I'm not saying I won't. I'm trying to tell you that I'll give you a reserved "yes", but I would have to answer the question further to tell you—

105 Q. All right, then for the record let's hear your reserved yes.

A. When there possibly would be a new employer, an independent such as the example here, our first request from an employer then is his present wages that he is paying his employees. We can then compare the difference of what the area scale is and what he is paying his employees and we generally negotiate to where the employer has up to one year to catch up to the rates that are the area rates. It gives an employer time to adjust his pay roll and depending on the amount of difference between what they're receiving and what they should be receiving how fast their raises come.

Q. Now, what if the employer wouldn't agree to your counter proposal of reducing these Schedule A wages for the first year if assuming he'd bring them up within a year? What if he wouldn't agree to that and said, "No, my counter proposal is I want something less than this for the entire two-year contract term." Would you then break off negotiations or would you make such an agreement?

A. Well, I can't honestly answer that, Mr. Mueller. We're on a hypothetical question. You have to resolve that in negotiations. I can't give you an answer right here and now.

Mr. Loeffler: If I may object to this line of questioning, I think he can argue that the remedy as a general remedy is inappropriate because of the ability of the employer
106 to perhaps bargain a lower rate. But, I think that's a matter of generalized argument and there's no reason to go into long discussions with Mr. Moreth as to what he would do with various hypothetical situations. I think he should be restricted to facts, with the experience of this

union. That may be an argument against the remedy as a whole, but we'd be wasting our time.

Trial Examiner: I was wondering when the objection was coming. The last question—I think the last answer was that this was hypothetical and I think, Mr. Mueller, I'll give you a little more leeway, but I'm not going to let you go much further on this. You can question him as to generally, if he's made concessions of this type and so forth, but not much more of it.

Q. (By Mr. Mueller) How long have you been in this area?

A. Since 1962.

Q. How long have you been——

A. If you're referring to me as a personal representative of the union.

Q. And how long have you been Secretary Treasurer?

A. Four months.

Q. You replaced whom?

A. Mr. Voeller.

Q. Prior to that you were what, just the business agent?

A. Business agent number one.

107 Q. Do you as a business agent negotiate these contracts?

A. I was in on all of them.

Q. Were you the negotiator for the union?

A. I would not have been considered the chief negotiator. However, I would have been in on negotiations.

Q. Your Local, 1401, does it have any reciprocity, say for instance, with Local 444 in Milwaukee?

Mr. Loeffler: Object on the ground of relevance.

Trial Examiner: I'll allow it. This is cross examination. Objection overruled.

Q. (By Mr. Mueller) Do you remember the question?

A. Yes, but I don't understand that word you used, though.

Q. Well, reciprocity would mean any relationship with. In other words, you know they exist in Milwaukee. Do you attempt at any time to get together and compare cards, so to speak, you know, your approaches and methods and contracts, your negotiating and things like this?

A. Local 444, which you referred to, out of Milwaukee, is the Retail Clerks union for that area. We are Local 1401. Both Locals belong to the Retail Clerks International Association, AFL-CIO, so obviously we are aware of the contracts that are in the area at that point. Each Local operates on their own autonomy, though.

Q. Would you deny the fact that Schedule A Wages are not uniformly in effect in Milwaukee by those stores
108 that are represented by Local 444?

A. I have nothing to do with Local 444 and I cannot answer for that Local. If anything, the wages are most likely higher, but I cannot answer for that Local.

Q. And as far as you know they could be lower? In other words, you don't know for a fact that they're higher?

Mr. Loeffler: I object.

Trial Examiner: I think we're really going a little bit too far and I'm going to stop this now.

Mr. Mueller: I just wanted to cover up that last statement.

Trial Examiner: We all understand.

Mr. Mueller: I have no further questions.

Trial Examiner: Any more?

Mr. Loeffler: I have nothing more.

Trial Examiner: Mr. Selby?

Mr. Selby: No ma'am.

Trial Examiner: Fine. Thank you very much.

(Witness excused.)

Mr. Loeffler: Now, at this time, can we stipulate as to the wage rates in effect as of February 15th?

Mr. Mueller: Or 14th?

Mr. Loeffler: The 14th.

Mr. Mueller: The following 26 employees were receiving the following wages—I'll just give their last names
109 for the record—this is on February 14th, for the payroll period ending, I guess, February 19th: Barreau, \$1.25, Bennett, \$1.35, Breeden, \$1.35, Bunker, \$1.67, Buroker, \$1.35, Campbell, \$1.86, Fick, \$1.25, Haime, \$1.35, Hamlin, \$1.35, Hamilton, \$2.00, Horner, \$1.45, Ingham, \$1.35, Kallas, \$2.10, Kaiser, \$1.25, Larsen, \$1.25, Lee, \$1.90, Luttig, \$1.25, Mitchell, \$2.00, Natale, \$1.35, O'Donnell, \$1.40, Rochester, \$1.25, Saladino, \$1.86, Schlotte, \$1.50, St. John, \$1.25, Stahl, \$2.00, and Weick, \$1.35.

May we go off the record and see what our status is here?

Trial Examiner: Yes, off the record.

(Discussion off the record.)

Trial Examiner: On the record.

You're still under oath, Mr. Moreth.

(Witness William A. Moreth resumed the stand.)

FURTHER RECROSS EXAMINATION

Q. (By Mr. Mueller) Are you aware of wage scales other than the clerks you represent in the Beloit area?

A. You mean non-union wages?

Q. All right, let's say non-union wages.

A. In your store?

Q. Any store other than employees you represent?

A. Yes.

Q. Are they higher or lower than this?

A. I've never yet seen any higher.

110 Q. And do you know whether or not unions other than Local 1401 represent retail clerks in this area?

A. Not to my knowledge.

Mr. Mueller: I have no further questions.

Trial Examiner: All right. You're excused.

(Witness excused.)

Now, we will take a short recess.

(A short recess was taken.)

Trial Examiner: The hearing is resumed.

Mr. Selby: We call Audrey Bunker to the stand.

Whereupon,

AUDREY BUNKER

was called as a witness by and on behalf of General Counsel and, after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Selby) Mrs. Bunker, please give us your name and address, spelling your last name?

A. Audrey Bunker, B-u-n-k-e-r, 1555 Cleveland, Beloit.

Q. You're presently employed by the Zinke's grocery store?

A. I am.

Q. How long have you been employed there?

A. About three years.

Q. What are your duties?

A. I'm a checker.

111 Q. You were aware of the union campaign in the store in the past several months?

A. Yes.

Q. Directing your attention to Saturday, March 12, of this year, did you have a conversation with Tom Kozel?

A. I did. I believe it was that date.

Q. Will you tell us what was said in that conversation?

A. I went up to Tom and asked him if he had a minute and if I could talk to him and he said yes. I said, "I'd like to talk about the union," and he said, "I'm glad you came to me, I couldn't come to you." We went down to the Steer Inn and had coffee and talked. I don't remember all the conversation, but I did ask him what would happen if the store did go union and he said it could go to cutting hours. I don't remember if he said there could be night stocking or not, and he said he didn't know, if it went union maybe Fred, being as he was, he might even sell the store.

Q. Fred who?

A. Zinke. Then I asked him if I could have Doris talk to him or tell her to talk to him.

Q. Meaning Doris Saladino?

A. Yes.

Q. Another employee?

112 A. Yes, and he said yes, but I couldn't say anything we had talked about because that was strictly in confidence, and he said I could tell Doris to come and talk to him, but he couldn't ask to talk to her. She had to ask to talk to him. Then Otto Stahl, another employee, walked up and he said, "If you don't believe anything I've said, you can ask Otto," and I said, "Tom, I don't have to ask Otto because you always told me the truth and I've always told you the truth," and we left.

Q. That was the end of the conversation?

A. Yes.

Q. About how long did it last?

A. About an hour.

Q. Was there any other employee from the store there?

A. No.

Q. Now, subsequent to that conversation did you contact any of the other employees with respect to speaking to Tom?

A. Not before the conversation, no.

Q. After the conversation?

A. Afterwards, I may have talked to one of the part-time employees. I think it was Al Bennett. I told him if he had any questions to go and talk to Tom, and I may have talked to Diane Haime, I don't remember.

Mr. Selby: No further questions.

Mr. Mueller: No questions.

Trial Examiner: Thank you very much.

(Witness excused.)

Whereupon,

DORIS SALADINO

113 was called as a witness by and on behalf of General Counsel and, after being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Selby) Please tell us your name and address, spelling your last name?

A. Doris Saladino, S-a-l-a-d-i-n-o, 1422 McKinley, Beloit.

Q. I see by your uniform that you're presently employed by Zinke's also?

A. Yes.

Q. And how long have you been employed there?

A. Two years last March.

Q. What are your duties there, Miss Saladino?

A. I'm a checker and I work in the office one day a week.

Q. Miss Saladino, directing your attention to about March 14 of this year, or about one or two days before the election that's involved here, do you recall having a phone conversation with Mrs. Bunker?

A. Yes. She knew that I was undecided and she said that she had talked to Tom and that he told her it was all right to talk to me, and she said if I wanted to I could go and talk to him. But, he couldn't come to me and ask me.

Q. All right, did you follow that conversation up?

A. Yes. Monday night before the election I waited for him and we went next door to the Calico Cat, over in the dining room, and I asked him what would happen.

114 Q. What would happen what?

A. If the union came into the store, and he told me I worked in the office, I could see the books anytime I wanted to, but if I wanted him to show me the books he would get them and show me that the store just couldn't afford to go union.

Q. Was anything mentioned about the kids working there?

A. I don't remember exactly whether it was at that time or not, but he did mention that some of the part-time employees would be laid off.

Q. There was also some mention of the Kohl's store in that conversation, wasn't there?

A. Yes, the Kohl's store was new and our business wasn't as good as it could have been.

Q. Do you recall anything else in that conversation?

A. I can't remember right now.

Q. Is your memory exhausted on that point?

A. Yes.

Q. Did you give a statement to me on the 25th of April, 1966?

A. I guess that was the date.

Q. I hand you that statement and ask you if that's your signature on the last page?

A. Yes.

Q. All right. I direct your attention to page 4 of that statement, the first sentence. Would you read that to yourself, please?

115 Q. Does that refresh your recollection as to what else may have been said during this conversation?

A. I forgot what it said already.

Q. Do you want to look at it again?

A. Just that some of the part-time employees would be laid off, isn't that what it says?

Q. Do you want to read it again? Take your time, relax.

Now, does that help refresh your memory?

A. Well, that some of the employees may have to be laid off because the store, with Kohl's opening, the store just couldn't handle the extra pay that would have to be paid out for that number of employees.

Q. Under what circumstances?

A. Well, if the union came into the store.

Q. Mrs. Saladino, directing your attention to some time prior to the election, probably within a week or two, do you recall Mr. Kozel receiving a letter from the union or the

National Labor Relations Board requesting a list of employees?

A. Uh huh.

Q. About when was that?

A. I don't know. I just know it was on a Wednesday.

Q. Well, in point of time, the number of weeks? Could you place it?

A. I can't remember.

Q. All right. It was before the election?

116 A. Yes.

Q. All right. What happened on that day?

A. Well, he asked me if I would make out a list of the employees in the grocery department because the meat department was already unionized. So, they wouldn't be needed on the list. So, he put a check mark by the names of the ones I was supposed to copy over and send out.

Q. You were were to put a check mark or he was?

A. No, he put a check mark by the name of the people I was supposed to copy down.

Q. I see.

A. Well——

Q. Do you recall what happened when the check marks were being placed?

A. When he came to Ed's name——

Q. Ed who?

A. Ed Kallas, he called him a name.

Q. What name did he call him?

A. S.o.b., and he said—no, I mean he just said the name and he was just upset because Ed had quit his job and come back and he'd hired him back and he started organizing the union in the store.

Mr. Mueller: I object to the last part of that testimony.

Trial Examiner: The answer will be stricken. Just tell us what he said.

117 Mr. Selby: Wait just a moment, I think the witness is testifying that's what he did say.

Trial Examiner: No. The answer was he was because he felt something.

Mr. Selby: All right, I'll ask the question.

Q. (By Mr. Selby) Mrs. Saladino, after calling the name, after Mr. Kozel called the name out, what do you recall him saying after that? What he said, what you recall him saying?

A. I can't remember. That's just, you know, I got it in my mind—

Trial Examiner: Well, in essence, it doesn't have to be his exact words.

The Witness: Well, just the idea that Ed had quit his job and he'd come back and Tom had given him his job back in good faith, not thinking that he'd pull something like that on him.

Mr. Selby: No further questions at this time.

Mr. Mueller: I have no questions.

Trial Examiner: Thank you very much, Mrs. Saladino. It wasn't as bad as you thought it was going to be, was it?

(Witness excused.)

Mr. Selby: General Counsel rests.

Mr. Loeffler: I rest.

Trial Examiner: Now, gentlemen, this is one of the times when I suggest, according to routine, maybe you'd like
118 to talk settlement. You know everything there is against you.

Mr. Mueller: Let the record show that the Examiner offered, but that the parties all shook their heads in the negative.

Trial Examiner: You may proceed, Mr. Mueller.

Mr. Mueller: At this time all I would ask the Trial Examiner to do is to take administrative notice of case numbers 13-RC-9259 and case number 30-RC-344.

Trial Examiner: That's 15-RC?

Mr. Mueller: That's 13-RC, the regional office in Chicago and 30-RC would be the regional office of Milwaukee.

Trial Examiner: Suppose you tell me what they're all about? Not "all about", but—

Mr. Mueller: I'll tell you what the purpose for the administrative notice is. In case number 13-RC-9259 the Amalgamated Meat Cutters sought representation of certain Respondent's employees in their meat department and as a result of an NLRB election conducted on April 5, 1963 the employees rejected unionization by a vote of two to one. And in case number 30-RC-344 the Meat Cutters again sought representation of the same employees and in that election conducted on November 3, 1965, the employees voted for certification.

Trial Examiner: The same unit involved here?

Mr. Mueller: The same unit, the meat department, which will all be reflected in the files, and they voted for representation. That basically the information.

119 Trial Examiner: You say that in November of '65—

Mr. Mueller: In the unit of meat department employees, we're not injecting a new issue, no no.

Trial Examiner: What is the relevance of this?

Mr. Mueller: This goes to good faith doubt, and this will be brought out in our brief.

Mr. Selby: You mean the meat department at this particular store?

Mr. Mueller: At this particular store. Other than that, Respondent has nothing else to offer, other than respectfully requesting that the Trial Examiner give as much time as she is able to for filing briefs, due to other briefs that are due and I have to work on.

Trial Examiner: I assume that means you are waiving argument, oral argument, at this point?

Mr. Mueller: Oh, yes.

Mr. Selby: General Counsel waives oral argument.

Mr. Loeffler: Charging Party waives oral argument.

Trial Examiner: I assume also everybody wants the maximum time.

As I figure it the maximum would be the 10th, but I always like briefs on Mondays, and when I was writing them rather than receiving them, I liked them on Mondays, too, because I'd mail them out Friday and have a free weekend. So that would be August 8th, wouldn't it? We'll set August 8th for briefs.

120 Mr. Mueller: Can we have the maximum, 'til the 10th?

Mr. Selby: The 8th is acceptable to General Counsel.

Trial Examiner: Make it the 8th.

You're all aware of the procedure, and if there is nothing further, the hearing is closed.

(Whereupon, at 5:05 o'clock p.m., the hearing in the above-entitled matter was closed.)

(JOINT EXHIBIT 1)

RETAIL CLERKS UNION LOCAL 1401

CHARTERED BY RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO
 JOSEPH W. COONER, 301 E. Johnson Street MADISON, WIS. 53703
 PHONE 257-4609

(JAMESVILLE OFFICE: 10 E. FRANKLIN ST., JAMESVILLE, WIS.)
 PLEASANT B-2047

February 14, 1966



Messrs. Fred and Gordon Zinke
 Zinke's Food Market
 1315 Madison Road
 Beloit, Wisconsin

Dear Sirs:

This is to advise you that Retail Clerks Union, Local No. 1401, represents a majority of the employees in your store located at 1315 Madison Road, Beloit, Wisconsin, in an appropriate collective bargaining unit consisting of:

"All regular full-time and regular part-time employees, excluding janitors, employees in the meat department, store manager, watchmen and guards and supervisors as defined in the Act."

We hereby demand that you recognize Retail Clerks Union, Local No. 1401, as the sole and exclusive bargaining agent for the employees in the aforementioned appropriate collective bargaining unit.

We are ready and willing to prove our majority representation by means of a card-check, with a neutral party of your own choosing verifying the signatures on the signed Authorization for Representation cards which have been submitted to us by the employees.

In addition, we demand that you or your designated representatives meet with us for the purpose of negotiating the terms of a collective bargaining agreement. We request that these negotiations be held on Monday, February 21, 1966 at a time and place of your choosing. We also request that no changes be made in the present wages, hours or working conditions until such time as they are duly negotiated.

If we do not receive a reply by February 21, 1966, we will assume that you are refusing our request for recognition and our demand for bargaining.

Very truly yours,

Peter P. Voeller
 Secretary-Treasurer

REC'D FEB 16 1966

(GENERAL COUNSEL EXHIBIT 3-A)

March 5, 1966

TO ALL ZINKE FOOD MARKET EMPLOYEES AND
THEIR FAMILIES

The National Labor Relations Board election is scheduled for *Wednesday*, March 16, 1966. The election will be held in the store between the hours of 5:30 to 6:30 *p.m.* The majority of those employees voting will decide whether all employees, excluding the meat department, want their *jobs to be controlled by the Union or not*. Therefore, in order to have the true answer to that question, it is important that each and every employee vote.

As we pointed out in our last letter, each of you should consider *only* what is important to *you* as an individual. Do not vote for the Employer and do not vote for the Union organizer, but *vote for yourself*.

What is in this for you? Generally, being treated fairly, good wages, and job security rank high in your job interests.

A union is not needed to insure fair treatment. Our business will only be profitable if we have satisfied, happy, and cooperative employees. This is the atmosphere that must prevail if any business is to run smoothly. This atmosphere has always been, and will always continue to be, the relationship that we attempt to maintain with each of you. This attitude does not depend upon whether a union represents you. It depends upon our desire to have a profitable business. We can attain that goal only if we have your cooperation and support. The presence of a union means only that we have to deal through a third party, an outsider, who has no interest in our welfare and therefore your job security.

The Union organizers have undoubtedly been making wild and extravagant promises as to the wage increases

each of you will get as a group if you vote for the Union. These promises are just that—promises. A union can only promise; it cannot pay a wage increase. It is an employer who makes wage increases. Wages, like the prices on the various products we sell, are determined by competition in a market. If an employer is to have satisfied employees, he must pay the wage rate which prevails for that type of work in the community in which the business is located.

The Union organizers may also attempt to win your vote by telling you that your job will be more secure if you vote to give it your rights. This just is not so. A union does not give employees security in their jobs. Job security depends upon the success of our business. This in turn depends upon our customers shopping and continuing to buy at our store. To attract customers we must maintain competitive prices on the items we sell. If the cost of getting the foodstuffs we sell on the shelves becomes too high and we are forced to raise prices, then we lose customers. If we lose customers we are forced to cut the cost of operation. Obviously, unions cannot guarantee job security. It is the successful operation of our store which provides this guarantee.

We do not think that a union has anything to offer you, except an opportunity to pay dues out of your paycheck. If you agree, vote "NO" in the election on *Wednesday*, March 16, 1966.

Sincerely,

Gordon F. Zinke

Tom Kozel

(GENERAL COUNSEL EXHIBIT 3-B)

March 11, 1966

TO ALL ZINKE FOOD MARKET EMPLOYEES AND
THEIR FAMILIES

In our last letter we pointed out that we do not think that a union has anything to offer you. Still, the professional Union organizers are probably continuing to make their big, fancy promises and trying to back these promises up by showing you labor contracts from other cities and companies. You have an important decision to make in the NLRB election on March 16, 1966. When making your decision, remember, the Union can promise nothing except that it will negotiate—and who can tell what this will lead to? It is only our customer who can guarantee us our jobs, pay, benefits, etc. Let's not gamble on losing him through the increased costs that unionization always brings.

Some of our employees are former union members. As they and some others of you probably know, a union often brings with it an atmosphere of discord, distrust, and dissension. This is because the union leader tries to justify the taking of your money in the form of union dues and special assessments. To do this the union leader looks for something to argue about. This, of course, leads either to strikes or to high costs and higher prices, which our customers will refuse to pay. When that happens, we all lose our only source of security—our customer.

How much is the professional Union leader concerned with your individual development or the success of this business? He is paid to do a job *for the Union*, which means to increase the *Union's* treasury and power.

You have a right to vote for the Union if you want to. If a majority of the employees who vote want to drive a wedge between you and your management and create the

dog-eat-dog atmosphere which union bargaining usually involves, we will be bound by your decision. Remember though, just because you may have signed a card for the Union does not mean that you cannot vote against the Union in the election. Each of you can vote either "YES" or "NO," depending upon the decision *YOU* now make, after hearing the other side.

We do not want a union. You and we have every reason to work together cooperatively in joint self-interest. A union cannot grow in an atmosphere of mutual confidence. Strife and distrust are more to a union's liking. If you agree with our position, vote "NO" in the NLRB election on March 16, 1966.

Be sure to vote!

Sincerely,

Gordon F. Zinke

Tom Kozel

(GENERAL COUNSEL EXHIBIT 3-C)

March 12, 1966

TO ALL ZINKE FOOD MARKET EMPLOYEES AND
THEIR FAMILIES

The news item set forth below appeared in the March 8, 1966 issue of The Wall Street Journal:

NON-UNION WAGES OUTGAIN UNION
PAY, FEDERAL OFFICIALS FIND

"Government data indicate non-union pay raises were the fatter last year, reversing a pattern of several years. Federal experts point to the Southern textile industry's third round of pay boosts in 18 months as a sample of the non-union trend. Explanations for the increases: New cotton subsidies to the mills, increased union organizing pressures, more difficulties in recruiting mill labor.

"Non-union pay increases this year are thought likely to be fatter than 1965's, too. *Contributing factors: More flexibility for non-union employers to change rates to compete for labor*, plus the impact on pocket-books of higher living costs and a new social security tax bite.

"Initial Federal data for 1966 show pay for some occupations rising faster in less organized areas than for the same occupations in highly unionized territory."

We feel this supports our position that you do not benefit from the Union. As we stated in a previous letter—"A union can only promise; it cannot pay a wage increase. It is an employer who makes wage increases. Wages, like prices on the various products we sell, are determined by competition in a market. If an employer is to have satisfied employees, he must pay the wage rate which prevails for that type of work in the community in which the business is located."

It is to your advantage to vote "NO" in the NLRB election this Wednesday, March 16, 1966. We expect you to vote in *your own* best interests—don't vote for the union organizer or your employer—*vote for yourself* and your own future. If you intend to vote "NO," we hope you will urge your fellow employees to do the same.

Sincerely,

Gordon F. Zinke

Tom Kozel

(GENERAL COUNSEL EXHIBIT 4)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel or representative, Russ R. Mueller, on behalf of Zinke's Foods, Inc. (hereinafter referred to as Respondent); David Loeffler, on behalf of Retail Clerks Union, Local No. 1401, Retail Clerks International Association, AFL-CIO; and Dennis M. Selby, Counsel for the General Counsel of the National Labor Relations Board, being all parties to the proceeding that:

Copies of the letters attached as General Counsel Exhibits 3A, B, and C dated March 5, 11 and 12, 1966, signed by Gordon F. Zinke and Tom Kozel, were mailed to all employees of Respondent on or about the dates indicated thereon.

ZINKE'S FOOD, INC.

By:

Russ R. Mueller

Date Executed: 7-1-66.

RETAIL CLERKS UNION, LOCAL NO. 1401, RETAIL
CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

By:

David Loeffler

Date Executed: 7-6-66.

NATIONAL LABOR RELATIONS BOARD

By:

Dennis M. Selby

Date Executed: 6-22-66.

(GENERAL COUNSEL EXHIBIT 5)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel or representative, Russ R. Mueller, on behalf of Zinke's Foods, Inc. (hereinafter referred to as Respondent); David Loeffler, on behalf of Retail Clerks Union, Local No. 1401, Retail Clerks International Association, AFL-CIO (hereinafter referred to as the Union); and Dennis M. Selby, Counsel for the General Counsel of the National Labor Relations Board, being all parties to the proceeding that:

The signature on the authorization card of Leonard Burcher, General Counsel's Exhibit 3, dated February 11, 1966 is authentic.

ZINKE'S FOOD, INC.

By:

Russ R. Mueller

Date Executed: 7-1-66.

RETAIL CLERKS UNION, LOCAL NO. 1401, RETAIL
CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

By:

David Loeffler

Date Executed: 7-6-66.

NATIONAL LABOR RELATIONS BOARD

By:

Dennis M. Selby

Date Executed: 6-22-66.

(GENERAL COUNSEL EXHIBIT 6)

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,
employee of the W. H. & A. Co. Inc.
1315 N. P. (City, State) Ill. 60610
Employed as Stock Clerk Dept. 1
I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered
Local Union to represent me for the purpose of collective bargaining, negotiating
terms of pay, wages, hours of employment, or other conditions of employment, in
accordance with applicable law, in addition I agree to "All-Union Agreement" between
the above named Employer and the Retail Clerks International Association,
AFL-CIO, or its chartered Local Union.

2/11/66 Date Leonard Swabker Signature of Employee

(GENERAL COUNSEL EXHIBIT 7)

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,

employee of the Zink's Food Market
(Firm Name)

Store Address 1315 Madison Blvd. Store No. _____

Employed as Stock boy Dept. Food
(Job Title)

Home Address 943 S. 1st St. Apt. 2 Phone 362-6525

I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, requesting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.

2/11/66 Date Rick A. Burgeon (Signature of Employee) HC 107a

2/11/66

Rick A. Burgeon

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,

employee of the ZINK'S CITY SUPER
(Firm Name)

Store Address 1513 Madison Road Store No. _____

Employed as Stock Dept. GROCERY
(Job Title)

Home Address 1915 Kenwood Ave Phone 2-5514

I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, requesting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.

2/11/66 Date Albert Bennett (Signature of Employee) HC 107b

Albert
2/10/66 Bennett

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,

employee of the ZINK'S CITY SUPER
(Firm Name)

Store Address 1513 Madison Road Store No. _____

Employed as Stock Dept. GROCERY
(Job Title)

Home Address 1415 S. 1st St. Phone 2-5267

I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, requesting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.

2/11/66 Date Thomas Horner (Signature of Employee) HC 107c

2/11/66

Thomas Horner

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,

employee of the Zink's City Super-Rite
(Firm Name)

Store Address 1315 Madison Rd Store No. _____

Employed as Produce Mgr. Dept. Produce
(Job Title)

Home Address Box 100 Lincoln Park Phone ME 5-2741

I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, requesting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.

2/11/66 Date Edward M. Kallas (Signature of Employee) HC 107d

2/11/66

Edward M. Kallas

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,
employee of the Wards Store (Firm Name)
Store Address: 1315 Madison St. Store No. _____
Employed as Pauline (Job Title) Dept. 51738
Home Address: 1122 W. Lincoln Phone 51738
I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of negotiating, negotiating rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.
Date 2/12/66 Signature of Employee Diane Kay Haimie

2/12/66
Diane Kay
Haimie

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,
employee of the Wards Store (Firm Name)
Store Address: 1315 Madison St. Store No. _____
Employed as Doris (Job Title) Dept. 51738
Home Address: 1122 W. Lincoln Phone 51738
I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of negotiating, negotiating rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.
Date 2/11/66 Signature of Employee Doris Sakalino

2/11/66
Doris Sakalino

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,
employee of the Wards Store (Firm Name)
Store Address: 1315 Madison St. Store No. _____
Employed as Diane (Job Title) Dept. 51738
Home Address: 1122 W. Lincoln Phone 51738
I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of negotiating, negotiating rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.
Date 2/13/66 Signature of Employee Diane Kaiser

2/13/66
Diane
Kaiser

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,
employee of the Wards Store (Firm Name)
Store Address: 1315 Madison St. Store No. _____
Employed as V. Pauline (Job Title) Dept. 51738
Home Address: 1122 W. Lincoln Phone 51738
I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of negotiating, negotiating rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.
Date 2/13/66 Signature of Employee V. Pauline Campbell

2/13/66
V. Pauline
Campbell

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,

employee of the Frank M. Mitchell (Print Name)

Store Address 1315 Madison Ave. Store No. _____

Employed as cashier (Job Title) Dept. merchandise

Home Address 2001 Broadway Phone 312-7112

I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, negotiating rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.

2-12-66 Date Frank M. Mitchell (Signature of Employee) 1315

2/12/66

Frank M
Mitchell

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,

employee of the CITY SUPER MARKET (Print Name)

Store Address 1315 MADISON AVE. Store No. _____

Employed as GROCERIES (Job Title) Dept. STOCK

Home Address 1641 BROADWAY Phone 7-7793

I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, negotiating rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.

2-12-66 Date Patsy A. Natale (Signature of Employee) 1315

2/12/66

Patsy A.
Natale

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,

employee of the Zinkas (Print Name)

Store Address 1315 Madison Road Store No. _____

Employed as Stock Clerk (Job Title) Dept. GROCERIES

Home Address 1352 VERONA Phone EM 2-2841

I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, negotiating rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.

2-12-66 Date Merlin Rochester (Signature of Employee) 1315

2/12/66

Merlin Rochester

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned,

employee of the Zinkas (Print Name)

Store Address 1315 Madison Road Store No. 716

Employed as Stock Clerk (Job Title) Dept. GROCERIES

Home Address 2245 E. 12th St. Phone 7-2241

I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, negotiating rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.

2-12-66 Date Harley Larsen (Signature of Employee) 1315

2/12/66

Harley Larsen

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

2/12/66
- Donna St. John

Desiring to enjoy the rights and benefits of collective bargaining, I, the undersigned,
employee of the 7-Eleven Stores (Firm Name)
Store Address 1315 Madison Rd. Store No. 7641
Employed as Checker (Job Title) Dept. General
Home Address 2115 E. B. Ave. To Phone 362-4936
I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, requesting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition, I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.
Date 2-12-66 Signature of Employee Donna St. John

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

2/11/66
Wayne Schlottke

Desiring to enjoy the rights and benefits of collective bargaining, I, the undersigned,
employee of the Zink's (Firm Name)
Store Address 1315 Madison Rd. Store No. 7641
Employed as Part Time Producer (Job Title) Dept. Produce
Home Address 2115 E. B. Ave. To Phone 362-4936
I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, requesting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition, I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.
Date 2/11/66 Signature of Employee Wayne Schlottke

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

2/12/66
Jean O'Donnell

Desiring to enjoy the rights and benefits of collective bargaining, I, the undersigned,
employee of the Gibbs (Firm Name)
Store Address 1315 Madison Rd. Store No. 7641
Employed as Checker (Job Title) Dept. General
Home Address 2115 E. B. Ave. To Phone 362-4936
I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, requesting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition, I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.
Date 2/12/66 Signature of Employee Jean O'Donnell

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the AFL-CIO)
Authorization for Representation

2/12/66
Michael Luttig

Desiring to enjoy the rights and benefits of collective bargaining, I, the undersigned,
employee of the 7-Eleven (Firm Name)
Store Address 1315 Madison Rd. Store No. 7641
Employed as Checker (Job Title) Dept. General
Home Address 2115 E. B. Ave. To Phone 362-4936
I hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union to represent me for the purpose of collective bargaining, requesting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law. In addition, I favor an "All-Union Agreement" between the above named Employer and the Retail Clerks International Association, AFL-CIO, or its chartered Local Union.
Date 2/12/66 Signature of Employee Michael Luttig

(COMPANY EXHIBIT 5)

February 16, 1966

Mr. Peter P. Voeller
Secretary-Treasurer
Retail Clerks Union Local 1401
301 East Johnson Street
Madison, Wisconsin 53703

Re: *City Super Market of Beloit*

Dear Mr. Voeller:

Your letter of February 14, 1966 addressed to Messrs. Fred and Gordon Zinke, wherein you demand that your union be recognized as the bargaining agent for employees working in a specified bargaining unit at the Beloit store, has been referred to this office.

We do not feel that a meeting with you would be fruitful since we question the appropriateness of the unit you describe. Furthermore, our client has been involved in other representational matters wherein the proving of majority status by authorization cards has been shown not to be a genuine indication of the employees' true desires respecting unionization. Thus, your request for recognition as the sole and exclusive bargaining agent is refused.

As you know, there are established procedures with the National Labor Relations Board for the determination of these issues, and if you care to pursue this matter, we presume that you will invoke them.

Very truly yours,

HOEBRECKX, DAVIS & VERGERONT

By:

Russ B. Mueller

RRM:lm1

cc: Mr. Gordon Zinke

(UNION EXHIBIT 1)



NATIONAL LABOR RELATIONS BOARD

REGION 30

Room 230, Commerce Building, 744 North Fourth Street

Milwaukee, Wisconsin 53203

David Loeffler, Esq.
Lawton & Cates
119 Monona Ave.
Madison, Wisconsin

Re: Zinke's Food Market

Case No. 30-RC-400

Gentlemen:

The objections in the above-captioned matter which you filed with this office have been assigned for the purpose of investigation to George Strick, Field Examiner, who will contact you as soon as possible. All inquiries concerning this matter should be addressed to him.

In the event you have not already done so, please serve the other parties with a copy of your objections pursuant to Section 102.69 of the Board's Rules and Regulations.

In the meantime, will you please submit to this office evidence in support of your objections. This evidence should include the names and addresses of witnesses who have knowledge of the facts, together with a brief statement of the facts to which the witnesses may be expected to testify. Unless such evidence is received in this office within 7 days of the date of this letter, we shall assume that no such evidence is available.

Very truly yours,

George Squillacote
Regional Director

cc: Peter Voeller, Secy.-
Treas., RCIA Local 1401
301 E. Johnson St.
Madison, Wis.

cc: Russ E. Mueller, Esq.
Hoebreckx, Davis & Vergeront
324 E. Wisconsin Ave.
Milwaukee, Wis.

30-33 (2/66)

(UNION EXHIBIT 2)

CLASSIFICATION	SCHEDULE "A" - WAGES						2
	4/17/66		10/16/66		4/16/67		
	PER HR.	PER WK.	PER HR.	PER WK.	PER HR.	PER WK.	
<u>Full-Time (Male)</u>							
0 to 6 months	\$2.008	\$ 80.50	\$2.058	\$ 82.90	\$2.108	\$ 84.90	
6 to 12 months	2.095	83.80	2.145	85.80	2.195	87.80	
12 to 18 months	2.195	87.80	2.245	89.80	2.295	91.80	
18 to 24 months	2.37	94.80	2.42	96.80	2.47	98.80	
After 24 months	2.525	101.00	2.575	103.00	2.625	105.00	
<u>Full-Time (Female)</u>							
0 to 6 months	\$1.875	\$ 75.00	\$1.925	\$ 77.00	\$1.975	\$ 79.00	
6 to 12 months	1.975	79.00	2.025	81.00	2.075	83.00	
12 to 18 months	2.043	82.50	2.113	84.50	2.163	86.50	
18 to 24 months	2.188	87.50	2.238	89.50	2.288	91.50	
After 24 months	2.288	91.50	2.338	93.50	2.388	95.50	
<u>Part-Time Clerks</u>							
0 to 6 months	\$1.685		\$1.735		\$1.785		
After 6 months	1.785		1.835		1.885		
<u>Hd. Cashier & Bookkeeper</u>	\$2.375	\$ 95.00	\$2.425	\$ 97.00	\$2.475	\$ 99.00	
<u>Hd. Clerk (Asst. Mgr.) & Produce Department Head</u>	\$3.00	\$120.00	\$3.05	\$122.00	\$3.10	\$124.00	

TXD-662-66

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case 30-CA-372
Case 30-RC-400

ZINKE'S FOODS, INC.

and

RETAIL CLERKS UNION, LOCAL NO. 1401, RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO

Dennis M. Selby, Esq., of Milwaukee, Wis., on behalf of the
General Counsel.

David Loeffler, Esq., (*Lawton & Cates*), Madison, Wis., on
behalf of the Charging Party.

Russ R. Mueller, Esq., (*Hoebreckx, Davis and Vergeront*),
Milwaukee, Wis., on behalf of the Respondent.

Before: *Josephine H. Klein*, Trial Examiner.

TRIAL EXAMINER'S DECISION

Statement of the Case

Case 30-CA-372 involves a complaint issued on May 16, pursuant to a charge filed against Zinke's Foods, Inc. (Respondent), by Retail Clerks Union, Local 1401, Retail Clerks International Association, AFL-CIO (Union), on April 1, amended on April 13, 1966.¹ Case 30-RC-400 arises

¹ Unless otherwise specifically indicated, all dates herein refer to 1966.

out of a petition for certification filed by the Union on February 21. Pursuant to a stipulation for certification upon consent election, an election was held on March 16. The Union lost the election and thereafter filed objections. Respondent moved to dismiss the objections. On May 18, the Regional Director issued his report and recommendation, in which he denied Respondent's motion to dismiss and recommended that the objections be set for hearing, in consolidation with the complaint proceeding. On June 2, the Board issued an order adopting the Regional Director's recommendations and ordering that the complaint and representation cases be consolidated for hearing.

Pursuant to due notice, the consolidated proceedings were heard by Trial Examiner Josephine H. Klein at Beloit, Wisconsin, on July 6. All parties appeared and were afforded full opportunity to be heard and to examine and cross-examine witnesses. All parties waived oral argument, but briefs have been received from the General Counsel, Respondent, and Charging Party.

Upon the entire record, including observation of the witnesses, and due consideration of the briefs, the Trial Examiner makes the following:

Findings of Fact

I. Jurisdiction

A. Respondent, a Wisconsin corporation, is engaged in the retail sale of grocery and related products, with its principal office and store at Wisconsin Dells, Wisconsin, and one store, the only store involved in these proceedings, located at Beloit, Wisconsin. During the past year, a representative period, Respondent had gross sales in excess of \$500,000 and during the same period purchased and received products and materials valued in excess of \$50,000 from firms located in Wisconsin which had received the said products and materials directly from points outside the said State. Respondent is and at all material

times has been an "employer" as defined in Section 2(2) of the National Labor Relations Act, as amended, 29 U.S.C. Secs. 151, *et seq.*, engaged in commerce as defined in Section 2(6) and (7) of the Act.

B. The Union is and at all material times has been a labor organization within the meaning of Section 2(11) of the Act.

II. The Unfair Labor Practices

A. *The Chronology*

There is no disagreement among the parties as to any of the facts. Either by answer to the complaint or by stipulation in the course of the hearing, Respondent admitted all the factual allegations in the amended complaint and objections to the election.² Respondent produced no witnesses and did not cross-examine any of the General Counsel's employee witnesses. Respondent admitted several alleged violations of Section 8(a)(1). As to the remaining allegations, the present dispute concerns inferences to be drawn from undisputed facts and two legal defenses interposed by Respondent.

On February 14 the Union sent Respondent a letter demanding recognition and bargaining as the representative of all the employees in Respondent's Beloit market "excluding janitors, employees in the meat department, store manager, watchmen and guards and supervisor as defined in the Act." In its letter the Union offered to prove its majority through a card check by a neutral party, chosen by Respondent. At the hearing Respondent stipulated that on February 14 the Union held valid bargaining authorization cards executed by 17 employees in an appropriate unit of 26.

² The only witness whom Respondent cross-examined was the union official whom the Charging Party called to testify in support of the particular remedy the Union is requesting. The Union's objections to the election were substantially identical to the allegations in the complaint.

On February 16, a day after Respondent's receipt of the Union's demand, counsel for Respondent replied in pertinent part as follows:

We do not feel that a meeting with you would be fruitful since we question the appropriateness of the unit you describe. Furthermore, our client has been involved in other representational matters wherein the proving of majority status by authorization cards has been shown not to be a genuine indication of the employees' true desires respecting unionization. Thus, your request for recognition as the sole and exclusive bargaining agent is refused.

As you know, there are established procedures with the National Labor Relations Board for the determination of these issues, and if you care to pursue this matter, we presume that you will invoke them.

On February 21 the Union petitioned for certification. Thereafter, pursuant to a stipulation for certification upon consent election, approved by the Regional Director on March 4, an election was scheduled for March 16 among—

All full-time and regular part-time employees . . . at [Respondent's] Beloit, Wisconsin store, excluding meat department employees, store manager, office clerical employees, guards and supervisors as defined in the Act.

Respondent thereupon embarked on an antiunion campaign which continued until about March 15, as summarized under the heading "Section 8(a)(1)," *infra*.

The Union lost the election on March 16 by a vote of 10 to 15. On March 21 the Union telegraphed the Regional Director as follows:

... PLEASE BE ADVISED THAT THE UNION OBJECTS TO THE ELECTION CONDUCTED IN THE ABOVE MANNER [SIC] ON WEDNESDAY

MARCH 15 [SIC³]. DURING THE COURSE OF THE ELECTION CAMPAIGN THE COMPANY ENGAGED IN A COURSE OF CONDUCT WHICH BOTH COERCED THE EMPLOYEES IN THE EXERCISE OF THEIR FREE CHOICE IN VIOLATION OF SECTION 8(a)(1) AND ADDITIONALLY THIS CONDUCT UPSET THE "LABORATORY CONDITIONS" SURROUNDING THE ELECTION. A DETAILED STATEMENT OF POSITION WILL FOLLOW.

On March 21 the Regional Director wrote to the Union, *inter alia*, requesting that it submit "evidence in support of your objections." The letter concluded:

Unless such evidence is received in this office within 7 days of the date of this letter, we shall assume that no such evidence is available.

On March 28 the Union filed a detailed statement of six specific objections.

On April 11, Respondent filed a motion to dismiss the objections, maintaining that the Union's telegram of March 21 was insufficient to serve as "objections" within Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, and that the subsequent statement of specific objections was untimely.

The Union's original charge, filed on April 1, set forth the same facts as were contained in its objections to the election. On April 13 it filed an amended charge adding allegations of refusal to bargain in contravention of Section 8(a)(5) and discriminatory treatment of Edward Kallas, leading to his constructive discharge on April 8 in violation of Section 8(a)(3). The complaint, issued on

³ March 15, 1966, was a Tuesday. The election here was held on March 16.

May 16, incorporated all but one of the allegations in the Union's amended charge.⁴

On May 18 the Regional Director issued his report and recommendation. In it he ruled that "the objections were timely filed, and contained the necessary form and substance to comply with Section 102.69." He further stated that "it does not appear that the Employer was prejudiced by the manner of the filing of the objections." Accordingly, he denied the motion to dismiss the objections. He recommended that the objections be set for hearing in consolidation with the complaint.

On June 2, 1966, the Board, through its Associate Executive Secretary, issued an order directing hearing. That order read in part:

No exceptions to the Regional Director's report having been filed by either party within the time provided therefor, the Board hereby adopts the Regional Director's recommendations as contained in his report. Accordingly,

IT IS HEREBY ORDERED that a hearing be held for the purpose of adducing evidence to resolve the issues raised by the Petitioner's objections, and that such hearing may be consolidated with any hearing on the complaint issued in Case No. 30-CA-372. . . .

IT IS FURTHER ORDERED that the Trial Examiner . . . designated for the purpose of conducting such hearing, shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said objections. . . .

By its answer to the complaint and motion to dismiss,

⁴ At the hearing the Union withdrew the one objection to the election which had not been adopted by the Regional Director in the complaint.

Respondent contends that the refusal to bargain charge should be dismissed because of the Union's loss of the election and its failure to file adequate and timely objections. Additionally, it maintains that the 8(a)(3) charge, involving Edward Kallas, should be dismissed as moot. It admits alleged violations of Section 8(a)(1) and, in its brief, in effect consents to a remedial order based thereon.

B. The Specific Unfair Labor Practices

1. Section 8(a)(1)

Between February 15, when Respondent received the Union's recognition and bargaining demand, and March 16, when the election was held, Respondent took the following action:⁵

On February 19, Respondent's manager, Tom Kozel,⁶

⁵ At the hearing, Respondent persistently objected to the admission of any evidence to prove the commission of unfair labor practices which Respondent admitted. Counsel maintained that "the legal inference to be drawn doesn't depend upon the color, so to speak, of whatever testimony you're going to deduce." When Respondent's counsel declined to stipulate that the only issue on the 8(a)(5) phase of the case was the effect of the election, the Trial Examiner overruled its objections to the evidence and permitted the General Counsel to present such evidence in support of allegations under Section 8(a)(1) as he believed bore on the alleged violation of Section 8(a)(5). See *Joy Silk Mills, Inc.*, 85 NLRB 1263, enf'd. 185 F.2d 732 (C.A.D.C.), cert. den. 341 U.S. 914; *Bernel Foam Products Co.*, 146 NLRB 1277; *Aaron Brothers Company of California*, 158 NLRB No. 108; *John P. Serpa, Inc.*, 155 NLRB No. 12.

It is unnecessary here, however, to review the evidence in detail, since the admitted allegations are sufficient to dispose of the issues raised. The nature of the violations alleged and admitted is such that had the General Counsel moved for "judgment on the pleadings," the Trial Examiner might well have granted the motion as to the 8(a)(1) and 8(a)(5) charges. *Pioneer Natural Gas Company*, 158 NLRB No. 127; *Collins & Aikman Corporation*, 160 NLRB No. 135. In any event, the General Counsel's undisputed evidence supports the factual allegations admitted by Respondent.

⁶ The complaint and the briefs of the General Counsel and the Union incorrectly spell this name as "Kozol."

coercively interrogated Edward Kallas, produce manager, concerning his union activities and threatened closure of the store if the employees chose to be represented by the Union. And on February 23, Kozel threatened to discharge Kallas for his union activities.⁷ Respondent stipulated at the hearing that it knew that Kallas was the leading employee organizer for the Union.

Kozel told employee Barreau that if the Union came in some of the present employees under 18 years of age would be fired and stocking would be done by adults at night.⁸ On March 12, 14, and 15, in individual meetings with three other employees (Bunker,⁹ Saladino, and Haime), Kozel threatened reduction in hours and/or loss of employment if the Union won the election.

On March 11, Kozel prohibited Kallas from speaking about the Union to any employees on Respondent's premises, although there is a non-public portion of the store available to employees in non-work periods. Such total prohibition of solicitation, including non-working time and areas, is clearly violative of Section 8(a)(1). *Marvin A.*

⁷ In its brief, Respondent says: "The record evidence would not prove this allegation of the complaint. . . . Although admitted, the lack of evidence in this regard further supports the conclusion that Respondent had no intention of embarking upon an illegal campaign to undermine the Union's claimed majority. Reference to "lack of evidence" comes with ill grace from Respondent, which labored diligently to keep out any evidence whatsoever concerning admitted violations. In any event, the Trial Examiner finds that the allegation in question was adequately supported by the testimony of Doris Saladino.

⁸ Employee Barreau reported this conversation to at least two of the young employees. That employees would discuss such conversations among themselves is natural and to be expected. Even if Respondent is not directly responsible therefor, the repetition of the threats is material at least to the validity of the election. *N.L.R.B. v. Staub Cleaners, Inc., et al.*, 357 F.2d 1, 3 (C.A. 2).

⁹ Bunker told at least one other employee of her conversation with Kozel.

Witbeck, d/b/a Witbeck's IGA Supermarket, 155 NLRB No. 14; *Montgomery Ward & Co.*, 145 NLRB 846, 848.

Respondent not only admits the facts stated above, but concedes that they constitute unfair labor practices under Section 8(a)(1). Indeed, Respondent's brief concludes, in effect, with a consent to an 8(a)(1) order.¹⁰

The General Counsel and Charging Party also contend that three letters sent by Respondent to each of its employees on March 5, 11, and 12¹¹ fell within the ban of Section 8(a)(1). Respondent admits having sent the letters but argues that they fell within the scope of free speech protected by Section 8(c).

The letter of March 5 stated, *inter alia*:

A union is not needed to insure fair treatment. Our business will only be profitable if we have satisfied, happy, and cooperative employees. . . . This atmosphere has always been, and will always continue to be, the relationship that we attempt to maintain with each of you. . . . We can attain that goal only if we have your cooperation and support. The presence of a union means only that we have to deal through a third party, an outsider, who has no interest in our welfare and therefore your job security.

The theme that a union would cause dissension between Respondent and its employees was amplified in the next letter as follows:

If a majority of the employees who vote want to drive a wedge between you and your management and

¹⁰ ". . . it is requested . . . the Trial Examiner recommended an order, limited in its affirmative portion to the posting of a Notice to the employees in the usual form, advising the employees that it will cease and desist from violations of Section 8(a)(1) of the Act."

¹¹ Apparently Respondent had sent at least one previous campaign letter, since the letter of March 5 said, in part: "As we pointed out in our last letter. . . ."

create the dog-eat-dog atmosphere which union bargaining usually involves, we will be bound by your decision.

We do not want a union. You and we have every reason to work together cooperatively in joint self-interest. A union cannot grow in an atmosphere of mutual confidence. Strife and distrust are more to a union's liking. If you agree with our position, vote "NO" in the NLRB election on March 16, 1966.

Such statements clearly constituted a threat of worsening, unpleasant working conditions, and denial of the employees' right to present grievances to management if the Union won the election. The threat of worsening relations between employer and employee was particularly coercive in this case, since, as conceded in Respondent's brief, the evidence shows that the store manager was already a hard "task-master" and extremely difficult to work for. See *infra*, footnote 16.

Further, the letters contain only thinly veiled threats of a loss of security in the event of a union victory. After stating that the Union had "no interest in our welfare and therefore your job security," the March 5 letter informed the employees that their job security depended on customers' continuing to buy at the store; if costs go up, prices must be raised and customers are lost; and "If we lost customers we are forced to cut the cost of operation. Obviously, unions cannot guarantee job security."

In the words of the Trial Examiner in *Graber Manufacturing Company, Inc.*, 158 NLRB No. 37 (TXD), the Trial Examiner here finds that Respondent's letters to its employees on March 5, 11, and 12—

. . . contained veiled threats that a selection by the employees of the Union as their bargaining repre-

sentative would inevitably have adverse economic consequences, including loss of work and jobs, as well as a loss of employees' statutorily protected right to present their own grievances to management.

The letters also contained clearly implied promises of better wages without a union than with one. In its letter of March 11, Respondent said:

. . . the union leader looks for something to argue about. This, of course, leads either to strikes or to high costs and higher prices, which our customers will refuse to pay. When that happens we all lose our only source of security—our customer.

Yet, the very next day Respondent sent its employees a letter in which it quoted an item from the Wall Street Journal headlined "Non-Union Wages Outgain Union Pay, Federal Officials Find," and added:

As we stated in a previous letter—"A union can only promise; it cannot pay a wage increase. It is an employer who makes wage increases. . . . If an employer is to have satisfied employees, he must pay the wage rate which prevails for that type of work in the community in which the business is located."¹²

Thus, the Trial Examiner finds that the letters of March 5, 11, and 12, when read in their entirety, and particularly against the background of Respondent's other admitted unfair labor practices (*McCormick Longmeadow Stone Co., Inc.*, 155 NLRB No. 53, footnote 1, citing *Savoy Leather Mfg. Co.*, 139 NLRB 425, 426), tended to interfere with, restrain, and coerce the employees in the exercise of their

¹² The evidence shows that Respondent's wage rates were below those in comparable unionized markets in the area.

rights under Section 7 and were thus violative of Section 8(a)(1).¹³

2. Section 8(a)(3)

The complaint charges that Respondent constructively discharged its employee Edward Kallas in violation of Section 8(a)(3). It alleges that from the middle of February, because of his union activities, Respondent made Kallas' working conditions "so onerous, burdensome, and intolerable that he was forced to quit his employment on April 7."

In addition to denying the charge, Respondent contends that the Kallas matter is moot because Kallas has been offered and has refused reinstatement and has received and accepted \$49.35 as "backpay."¹⁴ Agreeing with the General Counsel and the Charging Party, the Trial Examiner rules that the Kallas matter is not moot because it has considerable bearing on the refusal-to-bargain charge (*infra*, section 3, a); *N.L.R.B. v. Superior Sales, Inc.*, F.2d,

¹³ The finding that the letters constituted violations of Section 8(a)(1) is perhaps unnecessary since they are merely cumulative and do not affect the remedy to be recommended. The letters were outspokenly antiunion and clearly designed to dissipate the Union's majority. Thus, on the facts of this case, even if the letters by themselves were not violative of Section 8(a)(1), they would undoubtedly warrant a finding of violation of Section 8(a)(5). Cf. *Aaron Brothers Company of California*, 158 NLRB No. 108: "... an employer's bad faith may also be demonstrated by a course of conduct which does not constitute an unfair labor practice." Where, as here (see *infra*, section 3, a), an employer has no good-faith doubt as to the Union's claimed majority status, he is not entitled to insist on an election for the purpose of gaining time to dissipate that majority. See *N.L.R.B. v. Superior Sales, Inc.*, F.2d, 63 LRRM 2197, 2203-2204 (C.A. 8).

¹⁴ Respondent offered, and the Trial Examiner rejected, four exhibits to establish the offer of reinstatement, its rejection, and the payment and receipt of the \$49.35 as "backpay." While objecting to the admission of these exhibits, the General Counsel stipulated to the facts which they were offered to prove.

63 LRRM 2197, 2204 (C.A. 8); and that the backpay claim cannot be precluded by the employee's "settlement" without Board approval. (*Sehon Stevenson & Co., Inc.*, 150 NLRB 675, 687; *Jaycox Sanitary Service of Garden Grove, Inc.*, 161 NLRB No. 34, footnote 4.)¹⁵

The evidence concerning the Kallas matter may be briefly summarized.

Tom Kozel, manager of Respondent's Beloit market, is a difficult man to work for. The undisputed evidence establishes that, in supervising the store's employees, he is a chronic faultfinder.¹⁶

Kallas, produce manager in the market, had gone to work for Respondent in October 1964. On January 23, 1966, Kallas quit when a fellow employee reported that Kozel had said that Kallas was the worst produce man he had

¹⁵ Without prejudging any backpay claim, the Trial Examiner points out that Kallas testified that he did not work at all during the week he quit or the following week. He was paid only \$49.35 in "backpay," while the record shows that his hourly wage rate in February was \$2.10.

¹⁶ In its brief, Respondent states the matter somewhat more euphemistically, as follows: "By Kallas' own admission, Kozel as a store manager must obviously be a task-master. . . . Obviously, Kozel demands peak performance from his employees. . . . This quality, especially in these times, is commendable. Kallas' admissions concerning how difficult it is to work for Kozel, standing alone, establish that Kallas was not being discriminated against. . . ."

Concerning an argument he had had with Kozel before the advent of the Union, Kallas testified as follows: "I told him that he had had 150 people working in the store since I came that have gone and left and that he found faults with every one of them until they either quit or were fired. He said, 'There may have been 150, but there were 150 that weren't any good.' I said, 'No, it wasn't that they weren't any good.' Then, I said he wasn't any good, not the employees, and it was he who was ruining his own business. . . ."

Kozel did not testify.

ever had.¹⁷ Kallas then worked for another market for a few days. On January 28 he telephoned Kozel and the same day went back to work for Respondent.

The Union's organizing campaign began early in February. Kallas attended a union meeting on February 8 or 9 and thereupon became an active union proponent. It was he who collected the 17 authorization cards on which the Union's original claim of a majority was based. At the hearing Respondent stipulated that it had had full knowledge that Kallas was the leading employee organizer for the Union. Additionally, as previously stated, Respondent admits having interrogated Kallas concerning his union activities and having threatened him with discharge therefor in contravention of Section 8(a)(1).

The evidence shows that Kallas was subjected to virtually constant and unwarranted fault finding, with the result that he became nervously ill and unable to continue in Respondent's employ. Respondent presented no evidence whatsoever and in its brief makes only a token denial of this fact. Its basic defense on the merits to the 8(a)(3) claim appears to be that Kallas was not subjected to any worse treatment than were other employees or than he himself was before the advent of the Union. In its brief, Respondent states its position as follows:

Kallas' admissions concerning how difficult it is to work for Kozel, standing alone, establish that Kallas was not being discriminated against. It is reasonable to conclude from the record that union or no union, Kallas would have ultimately quit for the same reason he had quit previously.

¹⁷ Concerning his quit in January, Kallas testified, in part: "... Tom Kozel came down and asked me if I was going to stay or not, and I replied that I could not stay after having been told I was the worst produce manager he ever had. He said, 'I did not say that.' He said, 'I only added you were not the worst, you were the second worst.' Then I became angry and said a lot of things."

After briefly mentioning some of the incidents of unjustified criticism to which Kallas had been subjected,¹⁸ Respondent's brief continues:

. . . even if these things made Kallas quit a second time, it does not follow that the incidents which occurred were because of Kallas' membership in and activity on behalf of the Union. . . . Based on Kallas' testimony concerning his quit on January 23, it is reasonable that this type of thing could have happened irregardless [sic] of Kallas' membership in and activity on behalf of the Union.

* * * * *

Moreover, Kallas is either an unbelievable witness in view of his characterization of the situation as it existed in the store prior to his January 23 quit or in fact the situation was so bad that it is unreasonable to conclude that the frequency could have been increased. [Footnote omitted.]

Kallas' uncontradicted evidence, corroborated in substantial measure by a fellow employee, shows that Kozel's faultfinding and unwarrantedly critical supervision of Kallas increased considerably after Kallas became active on behalf of the Union. Both Kallas and Doris Haime, a fellow employee, quoted Kozel as having indicated that he considered Kallas' union activity "a dirty trick to pull" in view of Kozel's having taken him back after his prior quit. They also testified, again without contradiction or impeachment, that the frequency of Kozel's unwarranted criticism and supervision of Kallas increased after the union campaign began. Haime testified that:

¹⁸ There was considerable evidence of specific instances of humiliating and unwarranted mistreatment of Kallas by Kozel. No useful purpose would be served by reciting them here, since they are not denied. Respondent's position seems to be simply that "probably incidents of this nature were common" and there is no evidence that Kallas "was treated differently regarding them as to other employees."

... after the cards that were circulated were sent around, that we were send around, that we were to sign whether we wanted a union to negotiate for us for better working conditions. ... [Mr. Kozel] seemed to find more fault with things on the display case, with Mr. Kallas.

... it was done more often after ... the word of union was out.

Kallas testified as follows:

Q. ... from the middle of February to the time you quit, were there any incidents involving spoiled food in the produce department with Mr. Kozel?

A. There was always this, all the time, but after they were notified of the union it only increased constantly.

A. Well, I didn't do anything right any more, and [Tom Kozel] found fault with everything that was being done. I was no longer spoken to decently and as a matter of fact, I wasn't spoken to at all.

A. Matters that should have been discussed weren't. The only thing was the faults. I didn't know what was going to be in the paper, the sales, I wasn't told, I was never spoken to. If I said "Good morning" I was never answered. I was only found fault with, talked to in a harsh way, continuing more and more so, and finally I quit.

Q. Were there more problems with spoiled fruit and vegetables?

A. Yes, that increased, everything increased each day.

On Thursday, April 8, after not having worked at all that week, Kallas advised Otto Stahl, assistant store manager, that he was quitting. According to Kallas, he "was

of ill health which was brought about because of pressure that was put on [him] because of the union in those weeks and [he] could no longer take it. [He] was sick." He so advised the assistant store manager and "said it was no longer worthwhile fighting for to keep [his] job."

As previously noted, Respondent presented no testimony and did not cross-examine any of the General Counsel's employee witnesses. Respondent's failure to adduce any evidence in connection with the alleged 8(a)(3) violation, which it did not admit, warrants the inference that any evidence available to it was unfavorable to its position. *Bechtel Corporation*, 141 NLRB 844, 852, footnote 9; *N.L.R.B. v. Sam Wallick, et al., d/b/a Wallick & Schwalm Company, et al.*, 198 F.2d 477, 483 (C.A. 3). Specifically, Kozel's version of the Kallas history would have been illuminating.

On all the evidence, the Trial Examiner finds that displeasure with Kallas' leading role in the Union's organizational campaign was a significant and substantial motivating factor in Kozel's conduct which made working conditions intolerable for Kallas, leading to his quitting on April 8. It is a matter of pure speculation whether, as Respondent maintains, "Kallas would have ultimately quit" because of Kozel's conduct even without the union issue. However, it is not speculative, but here found as a fact, that Kallas quit when he did because of mistreatment dealt him in substantial part because of Kozel's displeasure with Kallas' union activities. Kallas' quit, therefore, amounted to a constructive discharge in violation of Section 8(a)(3). *Springfield Garment Manufacturing Company*, 152 NLRB 1043, 1059; *Saxe-Glassman Shoe Corporation*, 97 NLRB 332, 351, enfd., 201 F.2d 238, 243 (C.A. 1); *Burlington Industries, Inc., et al.*, 144 NLRB 245, 258.

3. Section 8(a)(5)

a. Refusal to recognize the Union

As previously stated, Respondent has stipulated to the

authenticity and validity of union authorization cards executed before February 14 by 17 out of the 26 employees in the appropriate bargaining unit. Although Respondent's reply to the Union's demand for recognition and bargaining asserted a doubt as to the propriety of the unit which the Union claimed to represent, the appropriate unit has never been a matter of dispute between the parties. Respondent does not now assert any such doubt in defense against the present complaint.¹⁹

Respondent's first, and apparently principal, defense to the refusal-to-bargain charge is based on the Union's loss of the election on March 16. As grounds for a motion to dismiss made at the hearing and by way of answer to the complaint, Respondent maintains that the election results are conclusive and cannot be set aside because the Union's objections to the conduct of the election were either too late or inadequate.

The Trial Examiner is of the opinion that such issue is not within her jurisdiction to decide. This issue was previously presented to the Regional Director, who ruled against Respondent and recommended that a hearing be held on the objections. The Regional Director's ruling, adopted by order of the Board (*supra*), is equivalent to "law of the case" and thus is binding on the Trial Exam-

¹⁹ Respondent's answer admitted the appropriateness of the unit described in the complaint but denied that it was the same unit which the Union originally sought to represent. The difference between the two definitions was the exclusion of "janitors" from the unit defined in the Union's letter. At the hearing there was no evidence as to the number of janitors, if any, employed at the market. Respondent has not contended that the difference is material. Since the total unit consisted of only 26 employees and the Union admittedly had 17 valid authorization cards, the difference in the descriptions of the unit could not be significant. Cf. *Wausau Steel Corporation*, 160 NLRB No. 47, footnote 1; *American Tea & Coffee Co., Inc.*, 160 NLRB No. 143 (TXD), footnote 42. In any event, Respondent appears to have taken no steps to clarify the matter, which it could easily have done.

iner. The Board order specifically directed "a hearing . . . for the purpose of adducing evidence to resolve the issues raised by the Petitioner's objections." The Trial Examiner, therefore, is not at liberty to pass on the issue raised by Respondent but is limited to consideration of the objections on the merits.²⁰

At the hearing Respondent's only defense on the merits was counsel's bare assertion of a good-faith doubt on Respondent's part as to the Union's majority on the demand date.

Respondent produced no witnesses to rebut the inference of bad faith arising from the undisputed facts. On the contrary, it persistently maintained that no evidence was admissible as to undisputed facts, the Trial Examiner being required to make the "good faith" determination solely by inference from the pleadings and stipulations of fact made during the hearing. See footnote 5.

The only step Respondent took to support its protestation of a good-faith doubt as to the Union's majority was to request that the Trial Examiner take notice of Board Cases 13-RC-9259 and 30-RC-344. Respondent maintains that these cases justify its asserted skepticism as the reliability of card checks as a means of determining employees' true wishes as to representation and that this skepticism alone proves Respondent's good-faith doubt of the Union's majority in the present case. The two representation cases cited involve the meat department in Respondent's market. Case 13-RC-9359 involved unit of three em-

²⁰ Issues litigated in the representation proceeding cannot be relitigated in a related complaint case. *L. L. Glascock, Inc.*, 160 NLRB No. 74, footnote 1; *S. H. Lynch and Company, Inc.*, 160 NLRB No. 8, and cases cited in footnote 4; *Heights Funeral Homes, Inc.*, 159 NLRB No. 69; *American Oil Company*, 106 NLRB No. 46. Presumably this rule is applicable to the present situation even though the ruling in question was interlocutory rather than part of a "final" decision in the representation case.

ployees. The Union made no demand on Respondent for recognition or bargaining but apparently submitted four authorization cards²¹ to the Board on March 18, 1963. A consent election held on April 5, 1963, resulted in a two-to-one defeat for the union, Local 444 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. The petition in Case 30-RC-344 was filed by the same union on October 15, 1965. At this time the unit consisted of five employees and the union submitted five authorization cards to the Board. A consent election held on November 3, 1965, resulted in a unanimous victory for the Union. It is difficult to understand how this history could reasonably create in Respondent's mind such doubt as to the reliability of card checks as to warrant its position in the present case, where the Union offered to submit the cards to a third party chosen by Respondent. See *N.L.R.B. v. Economy Food Center, Inc.*, 333 F.2d 468, 472 (C.A. 7); *N.L.R.B. v. Elliott-Williams Co., Inc.*, 345 F.2d 460 (C.A. 7). While the Meat Cutters Union did lose the 1963 election despite its apparently having secured cards from all three employees in the unit, the 1965 case completely corroborated the reliability of authorization cards as indicia of the employees' desires.

In any event,

A union's unsuccessful attempts at organizing other branches of a company's operations may not be relied upon by an employer to refuse at a different branch either to recognize the union or at least to undertake some inquiry into the actual extent of the union's representation. [*N.L.R.B. v. Overnite Transportation Company*, 308 F.2d 279, 283 (C.A. 4)]

In the *Overnite* case the company claimed a good-faith doubt on the basis of 13 incidents within the preceding 2 years

²¹ The fourth card apparently was that of a nonregular part-time employee who was held not properly included in the unit.

in which a union had claimed a majority which it could not later support.²² Cf. *American Tea & Coffee Co., supra*; *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 180 (C.A. 2).

Equally unpersuasive is Respondent's contention that:

The successful organization of the meat department employees in Case No. 30-RC-344 which culminated in a collective bargaining agreement illustrates the Respondent's adherence to the principles of collective bargaining and further supports the bona fide doubt of the Respondent in the instant case.

It is not clear to the Trial Examiner how the existence of a collective-bargaining agreement with the Meat Cutters, bargained after that union won an election and was certified, would tend to establish that Respondent had a good-faith doubt as to the present Union's majority on February 14.²³ Respondent's claim of a good-faith doubt "is negated by its course of unlawful conduct following the demands for

²² *N.L.R.B. v. Johnnie's Poultry Co.*, 344 F.2d 617 (C.A. 8), and *N.L.R.B. v. Hanaford Bros. Co.*, 261 F.2d 638 (C.A. 1), cited by Respondent, are factually so entirely different from the present case as to require no extended discussion. Among the most obvious differences are the facts that the employers there presented considerable affirmative evidence on their "good-faith doubt" defenses and there were present substantial questions as to the propriety of the bargaining units which the unions sought to represent. Nothing in the opinion in either of those cases would remotely support Respondent's contention that its prior experience with the Meat Cutters Union was sufficient to create a good-faith doubt as to the Retail Clerks' majority in the present case.

²³ The existence of a collective-bargaining agreement covering Respondent's meat department was asserted as a fact in Respondent's brief. While the Trial Examiner has no reason to doubt the truth of this assertion, she doubts whether she could "take judicial notice" thereof, as requested in Respondent's brief. The Trial Examiner cannot resist wondering why Respondent did not produce a company representative to testify if it believed the meat department bargaining was relevant. In any event, the Trial Examiner deems the "fact" irrelevant to the issues raised in the present case.

recognition." *National Can Corporation*, 159 NLRB No. 66. Had Respondent actually adhered to the principles of collective bargaining and refused to bargain with the present Union solely because of a genuine doubt as to the Union's majority, it would have permitted its employees to express their desires freely, uninfluenced by the "persuasion" of Respondent's unlawful preelection campaign.

In further defense on the merits, Respondent's brief argues:

... the record evidence does not suggest nor show that the Respondent's good faith doubt was not bona fide but prompted by hostility toward unionization. In this regard, it is pointed out that the Union claimed majority status on February 14 and that the election was conducted on March 16. Excluding consideration of the letters, all the conduct alleged to have violated Section 8(a)(1), with two exceptions, occurred subsequent to March 11, only five days before the election. ... This is almost one month after the Union claimed majority status. This establishes that Respondent was not buying time to destroy the claimed majority status.

The record shows a continuing antiunion campaign beginning shortly after the union demand, continuing and intensifying until shortly before the election. The Trial Examiner will not labor the obvious fact that the disruptive effect of unfair labor practices increases rather than decreases in proportion to their proximity to the election. That Respondent continued its antiunion campaign up until a few days before the election hardly tends to show that its insistence on an election was not motivated by a desire to gain time to undermine the Union or dissipate its majority.

The Trial Examiner accordingly finds, as the Board did in *Lake Butler Apparel Company, et al.*, 158 NLRB No. 85, that:

... Respondent engaged in an "open gauged campaign" of flagrant 8(a)(1) conduct which was calculated to undermine the Union's position with the employees so as to dissipate its majority status. This conduct refutes the existence of a good-faith doubt of the Union's majority status and establishes the illegality of Respondent's refusal to bargain. Accordingly, Respondent Company refused to bargain collectively within the meaning of Section 8(a)(5) of the Act.²⁴

See also *Vinylex Corporation, et al.*, 160 NLRB No. 148. The refusal to bargain after February 16, 1966, when Respondent rejected the Union's demand for recognition and bargaining, continues to be violative of Section 8(a)(5) despite the Union's loss of the election on March 16. *Borden Cabinet Corporation*, 159 NLRB No. 99.

b. Unilateral wage increases

At the hearing the General Counsel, with Respondent's consent, amended the complaint to add an allegation that Respondent violated Section 8(a)(5) on June 4, 1966,²⁵ by unilaterally granting wage increases to 15 employees without advising or consulting with the Union. Respondent has admitted the facts stated but denies that the alleged conduct constituted a violation of Section 8(a)(5), since Respondent was not obliged to recognize or bargain with the Union.

²⁴ Even if Respondent had shown a good-faith doubt as to the Union's majority status when it first refused to bargain, a bargaining order would be appropriate because of Respondent's "course of unfair labor practices directed at destroying that majority." *Bryant Chucking Grinder Company*, 160 NLRB No. 125. Cf. *Luisi Truck Lines*, 160 NLRB No. 45.

²⁵ The General Counsel's motion, contained in his brief, to correct the transcript (p. 19, l. 14) to show this date as "1966" instead of "1965" is hereby granted. His further motion to amend p. 70, l. 3, by the addition of the word "shot" is also granted.

The Trial Examiner's previous decision that Respondent was legally obligated to bargain with the Union necessarily entails the further decision that the admitted unilateral wage increases constituted unfair labor practices under Section 8(a)(5). That the Union had lost the election before the wage increases were granted does not alter this fact. Having undertaken to dissipate the Union's majority, Respondent cannot be heard to complain when required to assume the consequences of having the election set aside and the union majority status accepted as of the date on which it has been proved to have existed. *Consolidated Rendering Co., d/b/a Burlington Rendering Company*, 161 NLRB No. 3, footnote 1.

Conclusions of Law

1. Zinke's Foods, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Retail Clerks Union, Local No. 1401, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminating in regard to terms or conditions of employment of Edward Kallas, thereby discouraging membership in the Union, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(3) and (1) of the Act.

5. All full-time and regular part-time employees of the Respondent at its Beloit, Wisconsin, store, excluding meat department employees, store manager, office clerical employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining.

6. At all times since at least February 14, 1966, the Union has been the representative chosen for the purposes of collective bargaining by a majority of the employees in the appropriate bargaining unit and by virtue of Section 9(a) of the Act has been and is now the exclusive representative of all the employees in the said unit for the purpose of collective bargaining.

7. On February 14, 1966, the Union requested Respondent to bargain collectively with the Union.

8. By refusing at all time since February 16, 1966, to bargain collectively with the Union, Respondent has committed unfair labor practices affecting commerce within the meaning of Section 8(a)(5) of the Act.

9. By increasing the wage rates of some of its employees on June 4, 1966, Respondent has also committed unfair labor practices affecting commerce within the meaning of Section 8(a)(5) of the Act.

The Remedy

Having found that Respondent has engaged in flagrant unfair labor practices violative of Section 8(a)(1), (3), and (5) of the Act, the Trial Examiner will recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The nature of the unfair labor practices is such as to warrant a broad order and the Trial Examiner will so provide. *MacMillan Ring-Free Oil Co., Inc.*, 160 NLRB No. 70.

Since the General Counsel concedes that Edward Kallas has rejected an offer of full reinstatement, the affirmative order with respect to his discriminatory constructive discharge will provide only for backpay, to be computed in accordance with the formula and method prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, subject, however, to deduction of the amount of "backpay" already

received by him and tolling of interest thereon. *Ohio Scientific Products Corporation*, 151 NLRB 460, 465.

Under well-established authority a bargaining order is required and the Trial Examiner will so provide. *N.L.R.B. v. Frantz and Company, Inc.*, 361 F.2d 180, 62 LRRM 2229, 2230-2231 (C.A. 7); *Bernard Happack v. N.L.R.B.*, 353 F.2d 629 (C.A. 7); *N.L.R.B. v. Mid-West Towel and Linen Service, Inc.*, 339 F.2d 958 (C.A. 7); *Vinylex Corporation, et al.*, 160 NLRB No. 148; *Lincoln Manufacturing Co., Inc.*, 160 NLRB No. 146.

Additionally, the Trial Examiner will recommend that the Union's objections to the conduct of the election be sustained and the petition in Case 30-RC-400 be dismissed and proceedings held in connection therewith be vacated. *Borden Cabinet Corp.*, 159 NLRB No. 99.

More difficulty is encountered in considering the Union's request for additional remedial action. In reading multitudinous Board and court decisions, the Trial Examiner has come across few, if any, cases of the present type in which the employer's unfair labor practices were as flagrant and there was a similar virtually total absence of any defense or attempted explanation or justification. The fact is, as shown by the Union's loss of the election, that Respondent's misconduct has undermined the Union seriously. In its brief, the Union soundly discusses its own "institutional needs" as a factor which should be given careful consideration in devising an adequate remedy. With the Union's prestige among the employees substantially lessened,²⁸ its

²⁸ In its brief, the Union says: "It is clear that even with a bargaining order remedy the union is in a vulnerable position with the employees following the impact of serious 8(a)(1) and 8(a)(3) violations, and perhaps a three year delay in resolution of the dispute. The Union, in a real sense, has caused the employees a great deal of trouble. If, on the other hand, the return of the union to the bargaining table is correlated with a compensatory payment to the employees, the union can start from a fair position in its attempt to persuade the persons who once 'signed up' that it can adequately service their needs. *Frank Bros. v. NLRB*, 321 U.S. 702 (1944.)."

bargaining position is certainly less favorable than it would have been had Respondent bargained when it was obligated to. See, e.g., *Royal Plating and Polishing Co., Inc.*, 160 NLRB No. 72.

Additionally, and perhaps more important, the employees have already been denied the benefits of bargaining for over 9 months. While it perhaps cannot be said with absolute certainty that bargaining would have resulted in benefits to the employees, the probabilities certainly favor such conclusion.²⁷

One suggestion that has frequently been made to prevent an employer's reaping benefit from the delay occasioned by unlawful refusal to bargain is a Board order requiring that any contract eventually reached be made retroactive. Recently, however, the Board rejected this suggestion, apparently ruling that it was without authority to take such action. *Saks and Company*, 160 NLRB No. 59, affirming the decision of the Trial Examiner, who had said:

I am aware of no case where the Board has ordered benefits which have not been bargained by the Union. If and when the Union negotiates a contract, presumably it will negotiate for retroactivity in such respect as it then feels retroactivity is necessary. The Board processes may not be substituted for the collective bargaining of the parties.²⁸

²⁷ To predict in advance that no benefits would be received through bargaining would be tantamount to assuming that the employer would enter upon bargaining with a firm and adamant resolve not to reach agreement on a satisfactory contract. In the present case Respondent's unilateral grant of wage increases in itself demonstrates that good-faith bargaining undoubtedly would have realized benefits for the employees.

²⁸ But see *H. K. Porter Co. v. N.L.R.B.*, 363 F.2d 272, cert. denied 63 LRRM 2236, in which the Court of Appeals for the District of Columbia appears to have held that in appropriate circumstances the Board may order contract terms to which one of the parties has not agreed in collective bargaining

Even if we were to assume that in appropriate circumstances the Board could order that any contract bargained be made retroactive, such action might well be undesirable from the point of view of the employees, the injured parties. Such a condition might well serve seriously to restrict the benefits to which an employer might otherwise agree for the future. To the extent possible, collective bargaining should be free of any externally imposed restrictions.

In the present case the Union has recommended as a remedial measure that Respondent be required to compensate the employees involved by payment of amounts measured by the difference between the compensation actually received by them and the median compensation received by employees in comparable units under union contracts. This "compensation," according to the Union, would include fringe benefits, such as, for example, the value or cost to the employer of insurance benefits provided under union contracts.

Although, so far as the Trial Examiner is aware, the Board has never ordered "compensatory damages" as a remedy (other than backpay), in litigation it has taken "... the position that the compensatory damages remedy requested by the Union ... was not ... 'patently—outside the orbit of [the Board's] authority ...' (*N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385, 388). . . ." Response of the N.L.R.B. to Petition for Rehearing in Banc in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO v. N.L.R.B.*, No. 20,137 (C.A.D.C.).

The Trial Examiner is not prepared to express any opinion as to the practicality or advisability of the suggested remedy as one of general applicability. Suffice it to say that it avoids the legal pitfall of having the Board dictate the terms of a collective-bargaining agreement. Under the suggested remedy, the parties would be free of any restric-

tions on the scope of bargaining for the contract to govern their relationship in the future. The compensation would not be contractual but rather in the nature of "compensatory damages" for the past.

The first superficial objection which could be raised to the Union's suggestion is that it in effect involves a determination that if the employer had bargained it would have agreed to the median wages paid by similar employers under union contracts, whereas such determination is unwarrantedly "speculative." The Trial Examiner rejects this argument as a general principle. The law has always operated on the basis of "probabilities," refusing to deny relief to an injured party simply because of his inability to prove the nature and extent of his injury with mathematical precision and beyond all possible doubt. See, for example, *Harvey Ward Locke v. United States*, 283 F.2d 521, 524 (Ct. Cl.):

If a reasonable probability of damage can be clearly established, uncertainty as to the amount will not preclude recovery. . . . The amount may be approximated if a reasonable basis of computation is afforded. . . . "All that the law requires is that such damage be allowed as, in the judgment of fair men, directly and naturally resulted from the breach of the contract for which suit is brought."

As the Supreme Court said in *Bigelow, et al. v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264, 265:

. . . even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential as well as [upon] direct and positive proof."

. . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer should bear the risk of the uncertainty which his own wrong has created. . . . That principle is an ancient one . . . and is not restricted to proof of damage in antitrust suits. . . .

"The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery" for a proven invasion of the plaintiff's rights.

See also, e.g., *The Haverhill Gazette Company v. Union Leader Corporation*, 333 F.2d 798, 806-807 (C.A. 1); *Kelite Products, Inc. v. Albert J. Binzel, Jr. t/a Kelite Products of Alabama*, 224 F.2d 131, 144-145 (C.A. 5); *Brink's Inc. v. Hoyt*, 179 F.2d 355, 360-361 (C.A. 8).

It would be anomalous indeed if the law required a greater degree of proof of damages in administrative proceedings arising from violation of rights guaranteed by the remedial National Labor Relations Act than is required in courts of law. As said by the Board in *H. W. Elson Bottling Co.*, 155 NLRB No. 63:

The Board has a particular duty under Section 10(c) to tailor its remedies to the unfair labor practices which have occurred and thereby effectuate the policies of the Act. Thus, "depend[ing] upon the circumstances of each case," the Board must "take measures designed to recreate the conditions and relationships

that would have been had there been no unfair labor practice." [Footnotes omitted.]

While it cannot be *assumed* that a union would necessarily have successfully bargained for the benefits it may claim in a particular case, similarly it cannot be *assumed* that the union would have been unsuccessful. *General Finance Corporation v. Dillon*, 172 F.2d 924, 929 (C.A. 10). The Union (and/or the General Counsel) should be afforded an opportunity to show what it and/or the employees would probably have gained if Respondent had fulfilled its legal obligations. *United Mine Workers of America v. Patton, et al.*, 211 F.2d 742, 752 (C.A. 4), cert. denied 348 U.S. 824. Such evidence would, in general, appear to provide a reasonable basis for assessing damages. However, the compensation would not constitute "backpay" as such. Conceivably the injury sustained might consist of factors other than loss of probable wage increases. Thus, in holding that the Union should be permitted to show the probability that wage increases would have resulted from bargaining, the Trial Examiner does not mean to suggest that this would be the only relevant evidence or that "damages" would necessarily be measured by the standard here proposed by the Union.

With these general considerations, the Trial Examiner turns to a consideration of the Union's position and evidence in this particular case. Briefly summarized, the testimony of the Union's secretary-treasurer and business representative was as follows: 20 to 30 employees is the usual size of the food market covered by contracts it has.²⁹ It usually takes "three or four months at the most, from date of recognition" for the Union to secure a contract with a food market. Although the Union has an individual contract

²⁹ "... we have maybe one or two stores where there would be ten or twelve employees and there may in one store, I think, be as high as in the forties. But, the bulk of them run in the twenty to thirty members in food stores in this area."

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with each employer, it bargains simultaneously with all employers by whom it is recognized. The only individual bargaining the Union carries on is for first contracts with employers by whom it is recognized during the term of outstanding agreements. At present the Union has no such separate contracts. Among the stores with which the Union now has contracts is a market representing the same distributor as does Respondent.³⁰

The Union introduced in evidence the wage schedule which is incorporated in each and every contract it has with food markets within its jurisdiction. It provides wages as of April 17, 1966, with, generally, 5-cent-per-hour increases on October 16, 1966, and April 16, 1967. The union representative testified that:

In Beloit or Janesville they are under the exact same contract, every employer that's under contract is on that wage schedule right there.³¹

He further testified that all the employers under contract contributed \$16 per month per employee to a health and welfare insurance fund.

The union representative then testified concerning possible variation from the general wage scale in the case of a newly organized store. He said:

When there possibly would be a new employer, an independent such as the example here, our first request from an employer then is his present wages that he is paying his employees. We can then compare the difference of what the area scale is and what he is paying his employees and we generally negotiate to where the employer has up to one year to catch up to the rates that are the area rates. It gives an employer time to

³⁰ The Milwaukee local has a contract with another such market.

³¹ Because of this uniformity, there is no occasion to consider the Union's argument that generally "median" wages paid by comparable employers under union contracts should set the measure.

adjust his payroll and depending on the amount of difference between what they're receiving and what they should be receiving how fast their raises come.

The parties stipulated as to the wages paid by Respondent on February 14 and the increases granted in June.

The Trial Examiner is not ruling that the Union's evidence in this case would be sufficient to establish a measure of "damages" arising from Respondent's refusal to bargain. As the General Counsel observed in another connection at the hearing, the present proceeding was not concerned with enforcement or compliance. As a corollary, Respondent was not adequately on notice so as to meet any evidence concerning the "measure of damages." If the employees are to be "made whole," the amount necessary to achieve that result should be determined in a supplemental proceeding in accordance with the established procedure in 8(a)(3) cases.

At this point the Trial Examiner observes only that the evidence produced by the Union in the present case is sufficient to indicate that in a supplemental proceeding evidence may well be produced to prove with the requisite degree of legal certainty the damages which have been sustained by the employees as a result of Respondent's unfair labor practices. Accordingly, the Trial Examiner will recommend that the order to be issued in this case contain a requirement that Respondent make its employees whole for the loss caused them by Respondent's unfair labor practices, the amount of such loss, if any, to be determined in a supplemental proceeding.

"Effectuation of the Act's policies . . . requires that the employees whose statutory rights were invaded by reason of the Respondent's unlawful . . . action, and who may have suffered losses in consequence thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first

place." *Winn-Dixie Stores, Inc.*, 147 NLRB 788, 192, affd. in pertinent part 361 F.2d 512 (C.A. 5); *Royal Plating and Polishing Co., Inc.*, 160 NLRB No. 72; *Cities Service Oil Company*, 158 NLRB No. 120. The Trial Examiner, therefore, will recommend that the "damage" period commence on February 16, 1966, when Respondent first rejected the Union's demand, and continue until (1) the date Respondent commences to bargain in good faith with the Union, or (2) the failure of the Union to request bargaining within 5 days of this Decision, or to commence negotiations within 5 days of the receipt of Respondent's notice of its desire to bargain with the Union, or (3) the subsequent failure of the Union to bargain in good faith.

This delineation of the "damage" period is different from, and essentially inconsistent with, that implicit in the Union's specific request in this case. The Union does not claim that any payment is now due the employees under its proposed remedy. In this connection it says in its brief:

Adjustments can be made for the length of time required to negotiate a first contract, and if there is an industry rate with long historical career; the length of time permitted to a "newcomer" to come up to scale. In the instant case, no liability would accrue until 16 months from date of demand. . . .

Thus, the Union would, in effect, grant Respondent 16 months' "free time" from the date on which its legal obligation to bargain arose. Although the Union has not specifically spelled out all the implications of its position, presumably it would then allow Respondent such additional "free time" as was entailed in the bargaining conducted after issuance of the present Decision. Although only something over 8 months has now passed since Respondent's violation commenced, further litigation could postpone the commencement of bargaining for a period considerably more than 16 months from February 16, 1966. Then the bargaining process itself will necessarily consume some

time and the exact results cannot at this time be predicted. Such delay is inherent in the bargaining process and would have occurred if Respondent had voluntarily assumed its bargaining obligation when it was supposed to. But, had Respondent acted properly, it would not have had two "free" periods. To adopt the Union's apparent view that Respondent should be "exonerated" for 16 months from the date when it should have commenced bargaining would leave Respondent with a considerable portion of the fruits of its misconduct. It would also tend to substitute contractual provisions for remedial processes of the law. As previously stated, the Trial Examiner believes that the future should be left to the processes of free collective bargaining; the past is a matter for remedial action by the Board. This view conforms with the general principles applied by the Board in 8(a)(3) cases, namely, that because backpay is ordered not only to compensate employees discriminated against but also, and most importantly, to vindicate the public interest, its amount cannot be decisively determined or compromised by the parties without Board approval. The Trial Examiner further believes that the view here taken would result in less restriction, express or implied, on the bargaining process than would the Union's suggested approach.

RECOMMENDED ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that Respondent Zinke's Foods, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees coercively concerning their union sympathies and activities.

(b) Threatening to close its Beloit, Wisconsin, store if the Union become collective-bargaining representative of the employees.

(c) Threatening its employees with economic reprisals, including loss of employment or reduction in hours, because of their support of the Union.

(d) Discouraging membership in the Retail Clerks Union, Local No. 1401, Retail Clerks International Association, AFL-CIO, or any other labor organization, by harassing its employees, by forcing them to leave their employment, or by otherwise discriminating against them in regard to their hire or tenure of employment or any term or condition of their employment.

(e) Promising its employees economic benefits in order to induce them to refrain from supporting the Union.

(f) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act, except as permitted by Section 8(a)(3) of the Act.

(g) Refusing to bargain collectively with the Union as the exclusive bargaining representatives of its employees in the following unit:

All full-time and regular part-time employees of Respondent at its Beloit, Wisconsin, store, excluding meat department employees, store manager, office clerical employees, guards and supervisors as defined in the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Bargain collectively, upon request, with Retail Clerks Union, Local 1401, Retail Clerks International Association, AFL-CIO, as the exclusive representative of all the employees in the appropriate unit described above, with respect to rates of pay, wages, hours of employment and other conditions of employment; and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Make Edward Kallas whole for any loss of earnings he may have suffered as a result of the discrimination

against him in the manner provided in the section of this Decision entitled "The Remedy."

(c) Make its employees in the appropriate unit described above whole for any loss or damage they may have suffered as a result of Respondent's refusal to bargain collectively with the Union in the manner provided in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful in checking compliance with this Order.

(e) Post at its store in Beloit, Wisconsin, copies of the attached notice marked "Appendix."³² Copies of said notice, to be furnished by the Regional Director for Region 30, shall, after being duly signed by Respondent, be posted by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Decision, what steps it has taken to comply herewith.³³

³² In the event that this Recommended Order shall be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

³³ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

The Trial Examiner further recommends that the election held on March 16, 1966, in Case 30-RC-400 be set aside and that proceeding be vacated.

Dated at Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL bargain, upon request, with Retail Clerks Union, Local No. 1401, Retail Clerks International Association, AFL-CIO, as the exclusive representative of:

All full-time and regular part-time employees at our Beloit, Wisconsin, store, excluding meat department employees, store manager, office clerical employees, guards and supervisors as defined in the Act, and we will embody any understanding reached in a signed contract.

WE WILL make Edward Kallas whole for any loss of earnings he may have suffered as a result of the discrimination against him.

WE WILL make all our employees in the above-described unit whole for any loss they may have suffered as a result of our failure to bargain, in the manner and for the period required by the recommended order of a Trial Examiner.

WE WILL NOT refuse to bargain collectively with the above-named union as the exclusive bargaining representative of all the employees in the bargaining unit described above.

WE WILL NOT coercively interrogate our employees concerning their union sympathies and activities.

WE WILL NOT threaten to close our store if the Union is designated as the exclusive bargaining agent for the employees.

WE WILL NOT threaten our employees with adverse economic consequences, including loss of employment or reduction in hours, or with loss of their right to talk with management about their grievances, if the Union is designated as exclusive bargaining representative of the employees in the above-described unit.

WE WILL NOT grant or promise economic benefits for the purpose of influencing our employees to induce them to refrain from supporting the Union.

WE WILL NOT discourage membership in or activities on behalf of the above-named Union, or any other labor organization, by discharging employees or otherwise discriminating in regard to hire or tenure of employment or any term or condition of employment of any of our employees.

WE WILL NOT in any manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that those rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

ZINKE'S FOODS, INC.

Employer

Dated By
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 2nd Floor Commerce Building, 744 North 4th Street, Milwaukee, Wisconsin, 53203, Telephone No. 272-8600.

**RESPONDENT'S EXCEPTIONS TO
THE TRIAL EXAMINER'S DECISION**

Respondent, Zinke's Foods, Inc., by its attorneys, Hoebreckx, Davis & Vergeront, hereby excepts to the rulings, findings, conclusions, and recommendations contained in the Trial Examiner's Decision in the above-captioned cases, as follows:

1. The finding on page 7, lines 1-2, that the letter of March 5, 1966, has a theme that the Union would cause dissension between Respondent and its employees. See Brief, § III, C.

2. The finding on page 7, lines 1-2, that the letter of March 11, 1966, amplifies the theme that a union would cause dissension between Respondent and its employees. See Brief, § III, C.

3. The finding on page 7, lines 14-16, that statements in the letters of March 5 and 11, 1966, set forth on page 6, lines 26-33, and page 7, lines 4-12, clearly constituted a threat of worsening, unpleasant working conditions, and denial of employees' right to present grievances to management if the Union won the election. See Brief, § III, C.

4. The finding on page 7, lines 16-20, that the threat of worsening relations between employer and employees was particularly coercive in this case, since the evidence shows that the store manager was already a hard "taskmaster" and extremely difficult to work for. See Brief, § III, C.

5. The finding on page 7, lines 22-28, that the letters contained veiled threats of a loss of security in the event of a union victory. See Brief, § III, C.

6. The finding on page 7, lines 30-38, that Respondent's March 5, 11, and 12, 1966, letters to its employees contained veiled threats that a selection by the employees of the Union as their bargaining representative would inevitably have adverse economic consequences, including loss of work and

jobs, as well as a loss of employees' statutorily protected right to present their own grievances to management. See Brief § III, C.

7. The finding on page 7, lines 40-41, that Respondent's letters to its employees contained clearly implied promises of better wages without a union than with one. See Brief, § III, C.

8. The finding on page 8, lines 1-7, that Respondent's letters to its employees of March 5, 11, and 12, 1966, when read in their entirety and particularly against the background of Respondent's other admitted unfair labor practices, tended to interfere with, restrain, and coerce employees in the exercise of their rights under § 7 and were thus violative of § 8(a)(1). See Brief, § III, C.

The finding on page 8, lines 34-35, that Respondent's letters to its employees were outspokenly anti-union and clearly designed to dissipate the Union's majority. See Brief, § III, C.

10. The finding on page 8, lines 36-37, that even if Respondent's letters to its employees were not by themselves violative of § 8(a)(1), they would undoubtedly warrant a finding of a violation of § 8(a)(5). See Brief, § III, C.

11. The finding on page 8, lines 40-42, that Respondent had no good faith doubt as to Union's claimed majority status. See Brief, § III, D.

12. The findings on page 12, lines 6-13, that the issue whether the election results are conclusive cannot be set aside because the Union's objections to the conduct of the election were either too late or inadequate is not within the Trial Examiner's jurisdiction to decide. See Brief, § III, A.

13. The finding on page 12, lines 13-17, that the Regional Director's ruling against Respondent's Motion to Dismiss the Union's Objections, which was adopted by order of the Board, is equivalent to "law of the case" and thus is binding on the Trial Examiner. See Brief, § III, A.

14. The finding on page 12, lines 19-21, that the Trial Examiner is not at liberty to pass on the issue raised by Respondent, but is limited to consideration of the objections on the merits. See Brief, § III, A.

15. The finding on page 12, lines 48-54, that issues litigated in a representation proceeding cannot be relitigated in a related complaint case, is applicable to the present situation, even though the ruling in question was interlocutory rather than part of a "final" decision in a representation case. See Brief, § III, A.

16. The finding on page 13, lines 17-25, and lines 43-54, that Respondent's entire experience with the Meat Cutters' Union in its attempt to organize Respondent's meat department employees, was not sufficient to create a good faith doubt as to the reliability of the Union's majority. See Brief, § III, D.

17. The finding on page 14, lines 12-19, that Respondent's good faith doubt is negated by its course of unlawful conduct following the demands for recognition, and that Respondent did not permit its employees to express their desires freely, uninfluenced by the "persuasion" of Respondent's unlawful pre-election campaign. See Brief, § III, D.

18. The finding on page 14, lines 34-41, that the continuation of an anti-union campaign by Respondent up until a few days before the election shows that its insistence on an election was motivated by a desire to gain time to undermine the Union or dissipate its majority. See Brief, § III, D.

19. The findings on page 15, lines 1-10, that Respondent engaged in an "open-gauged campaign of flagrant 8(a)(1) conduct which was calculated to undermine the Union's position with the employees so as to dissipate its majority status" and that Respondent did not have a good faith doubt of the Union's majority status. See Brief, § III, D.

20. The conclusion of law on page 16, lines 20-24, that at all times since at least February 14, 1966, the Union has been the representative chosen for the purpose of collective bargaining by a majority of the employees in the appropriate bargaining unit and by virtue of § 9(a) of the Act, has been and is now the exclusive representative of all the employees for the purpose of collective bargaining. See Brief, § III, A, 3.

21. The conclusion of law on page 16, lines 29-31, that by refusing at all times since February 16, 1966, to bargain collectively with the Union, Respondent has committed unfair labor practices affecting commerce within the meaning of § 8(a)(5) of the Act. Since the election results cannot be set aside, Respondent cannot be found to have refused to bargain in violation of § 8(a)(5). See Brief, § III, A.

22. The recommendation on Page 17, lines 8-11, that the Union's objections to the conduct of the election be sustained and the Petition in Case 30-RC-400 be dismissed and proceedings held in connection therewith be vacated. See Brief, § III, A.

23. The conclusion on page 16, lines 39-45, that Respondent engaged in "flagrant unfair labor practices" and that the nature of these is such as to warrant a broad order. Excluding consideration of the letters, which are protected by § 8(c), the 8(a)(1) and (3) conduct occurred within circumstances which prevent this conclusion. Thus, the conduct of Kozel on February 19 in interrogating and threatening Kallas is an isolated incident, the occurrence of which is not alarming, because Kozel is not versed in the intricacies of labor law. The incident is also not part of a grand design to undermine the Union. This is illustrated by the fact that Kozel first asked two other employees who were present to leave the area before he talked with Kallas (Tr. 57, 59). The individual interviews with employees Bunker and Saladino, while not only occurring almost one month after the Union's claim of majority status, were

requested by the employees (Tr. 111, 112, 113). The interview with employee Haime also indicates that she caused the occurrence (Tr. 112). It was also established that Respondent was attempting to walk the narrow road of permissible conduct which must be traveled prior to an election (Tr. 113). Lastly, the record evidence upon which the constructive discharge is based is quite tenuous. Kallas had quit prior to the introduction of the Union because of the very same reasons (Tr. 46-52).

24. Page 17, line 13, through page 22, line 37, in regard to the remedy of compensatory damages. See Brief, § III, B.

25. The recommendation on page 23, lines 4-8, that Respondent cease and desist from discouraging membership in "any other labor organization." The record does not, indeed it could not, show a history of unfair labor practices. *NLRB v. Laney & Duke Storage Warehouse Co., Inc.*, F.2d (CA-5, 1966), 54 LC 11610. See also, exception No. 23.

26. The recommendation on page 23, lines 13-15, that Respondent cease and desist from violating Section 7 "in any other manner." The order is too broad and thus unenforceable. *NLRB v. United States Steel Corp.*, 278 F.2d 903 (CA-3, 1960). See also, exception No. 23.

27. The recommendation on page 23, lines 27-33, that Respondent cease and desist from refusing to bargain collectively with the Union as exclusive bargaining representative of its employees. See Brief, § III, A.

28. The recommendation on page 23, lines 27-33, that Respondent bargain collectively upon request with the Union as the exclusive bargaining representative of all the employees in the appropriate unit with respect to rates of pay, wages, hours of employment and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. See Brief, § III, A.

29. The recommendation on page 23, lines 39-43, that Respondent make its employees in the appropriate unit whole for any loss or damage they may have suffered as a result of Respondent's refusal to bargain collectively with the Union in the manner provided in the section of this decision entitled "The Remedy." See Brief, § III, B.

30. The recommendation on page 24, lines 12-13, that the election held on March 16, 1966, in Case 30-RC-400, be set aside and that the proceedings be vacated. See Brief, § III, A.

Dated at Milwaukee, Wisconsin, this 13th day of January, 1967.

Respectfully submitted,

HOEBRECKX, DAVIS & VERGERONT

By Russ R. Mueller

Attorney for Zinke's Foods, Inc.

Respondent

185 NLRB No. 109

D-3025

Beloit, Wisconsin

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD

Cases 30-CA-372, 30-RC-400

ZINKE'S FOODS, INC.

and

RETAIL CLERKS UNION, LOCAL NO. 1401,

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO ¹

DECISION AND ORDER

On December 14, 1966, Trial Examiner Josephine H. Klein issued her Decision in the above-entitled proceedings, finding that Respondent Zinke's Foods, Inc., had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, including an order directing the Respondent to make whole its employees for any losses suffered due to its unlawful refusal to bargain with the Charging Party, as set forth in the attached Trial Examiner's Decision. The Trial Examiner further recommended that the Union's objections to the conduct of the election conducted on March 16, 1966, in Case 30-RC-400, be sustained, that the election be set aside, and that the proceedings in connection therewith be vacated. Thereafter,

¹ Hereinafter sometimes referred to as the Union, the Charging Party, or the Retail Clerks.

the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, the Charging Party filed a brief in support of that Decision, and the General Counsel filed a brief in answer to certain portions of Respondent's exceptions.

On May 26, 1967, the National Labor Relations Board, because of the novel and important issues posed by the compensatory remedy adopted by the Trial Examiner, granted oral argument in this and three other cases involving the same or related issues² and consolidated these four cases for purposes of oral argument. The Board granted a number of motions for permission to file briefs *amicus curiae* and invited certain other interested parties to file briefs and to participate in the oral argument which was conducted on July 12 and 13, 1967.³

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs of the parties and those submitted *amicus curiae*, the oral arguments made before the Board, and the

² *Ex-Cell-O Corporation*, 185 NLRB No. 20; *Herman Wilson Lumber Company*, NLRB No. ; *Rasco Olympia, Inc.*, d/b/a *Rasco* 5-10-25c, 185 NLRB No. 110.

³ Briefs were received from The Chamber of Commerce of the United States, the National Association of Retail Merchants, The American Federation of Labor and Congress of Industrial Organizations, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, all of whom participated in the oral argument. Briefs were also submitted by the National Association of Manufacturers, Preston Products Company, Inc., and The NAACP Legal Defense and Educational Fund, Inc.

entire record in the proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith.

There is no dispute as to the relevant facts in this case. The Charging Party began its organizational campaign in early February 1966, and demanded recognition on February 14, 1966. Although, at the hearing, the Respondent admitted that the Union possessed valid authorization cards on February 14 from 17 employees in an appropriate unit of 26 employees, the Respondent refused to recognize the Union. Thereafter, the Union filed a petition, and a stipulation for consent election was entered into by the parties and approved by the Regional Director on March 4. In the ensuing election, which was conducted on March 16, 1966, a majority of the votes was cast against the Union, and it filed objections to the conduct thereof.

The Respondent does not seriously dispute, and the Trial Examiner found that, during the period immediately preceding the election, the Respondent engaged in repeated acts of interrogation, threats to close the store, threats of discharge, and threats of reduction in hours or loss of work. The Trial Examiner further found that the Respondent sent various letters to its employees which contained similar threats. The Respondent also prohibited employee Kallas from speaking about the Union at any time and in any portion of its premises. We agree with the Trial Examiner that the Respondent thereby violated 8(a)(1) of the Act and we find that such activities interfered with the conduct of the election.

We further agree with the Trial Examiner, for the reasons stated in her Decision, that the Respondent constructively discharged employee Edward Kallas on April 7, 1966, in violation of Section 8(a)(3) of the Act.

Finally, we also agree with the Trial Examiner that the Respondent, by refusing to recognize and bargain with the Union since February 14, and by granting unilateral wage

increases on June 4, 1966, violated Section 8(a)(5) of the Act, and the issuance of a bargaining order is warranted. Respondent's pattern of unlawful conduct, as found by the Trial Examiner and as set forth above, was of such a nature as to have a lingering coercive effect. Therefore, use of traditional remedies is unlikely to ensure a fair or coercion-free election. We are persuaded that the authorization cards executed by a majority of the employees in the unit represent a more reliable measure of employee desire on the issue of representation in this case, and that the policies of the Act will be effectuated by the imposition of a bargaining order. *N.L.R.B. v. Gissel Packing Company*, 395 U. 575 (1969).

As noted above, the compensatory remedy adopted by the Trial Examiner herein raises novel and important issues. In our decision in *Ex-Cell-O Corporation*,⁴ we set forth our reasons for concluding that, in that case, a reimbursement remedy such as the Trial Examiner recommended in the instant proceeding should not be granted. Those reasons are equally applicable to the case now before us. Accordingly, we shall not order such a remedy herein, and we shall adopt the Remedy recommended by the Trial Examiner as modified herein to delete such provision.⁵

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Zinke's Foods, Inc., Beloit, Wisconsin, its officers, agents, succes-

⁴ *Supra*.

⁵ For the reasons set forth in the dissenting opinion in *Ex-Cell-O Corporation*, *supra*, Member Brown would grant the compensatory remedy and direct that the Respondent herein make whole its employees for any losses resulting from the unlawful refusal to bargain with the Union.

sors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as herein modified.

1. Delete paragraph 2(c) of the Trial Examiner's Recommended Order and renumber paragraphs 2(d), (e), and (f) thereof as paragraphs 2(c), (d), and (e) respectively.

2. Delete the fourth indented paragraph of the "Notice to all Employees."

Dated, Washington, D.C., Oct. 7, 1970.

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 24704

RETAIL CLERKS UNION, LOCAL No. 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

**PETITION TO REVIEW AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

Pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 141, *et seq.*), Retail Clerks Union Local 1401, Retail Clerks International Association, AFL-CIO, petitions this Court to review and modify an order of the National Labor Relations Board entered on October 7, 1970, in a proceeding before the National Labor Relations Board entitled *Zinke's Foods, Inc. and Retail Clerks Union, Local 1401, Retail Clerks International Association, AFL-CIO*, Case Nos. 30-CA-372 and 30-RC-400.

1. After due proceedings had before the Board in which the petitioner herein was charging party and in conformity with the procedure specified in Sections 10(b) and (c) of the National Labor Relations Act, as amended, the Board on October 7, 1970, issued its Decision, finding that Zinke's Foods, Inc. (hereafter the "Company") had engaged in unfair labor practices and ordering the Company to take certain action to remedy these violations of the Act. Petitioner seeks review and modification of the Board's Decision and Order on grounds that it fails to implement the

purposes of the Act and fails to provide a complete and effective remedy for the unfair labor practices found.

2. Venue is based upon that part of Section 10(f) of the National Labor Relations Act, as amended, which provides:

Any person aggrieved by a final order granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court a written petition praying that the order be modified or set aside.

Petitioner is a person aggrieved by the Board's order denying relief.

3. The Board erred in failing to remedy fully the unfair labor practices alleged in the complaint. The Board found that the Company unlawfully refused to bargain and in other ways interfered with the rights of its employees under the Act. However, the Board's order merely requires the Company to cease and desist its unlawful conduct and to bargain prospectively with the Union; the order fails to remove the benefits accruing to the Company from its unlawful refusal to bargain and fails to make the employees whole for their economic losses sustained as a result of that violation, from the initial date of the refusal to bargain through final compliance. The Board's failure in this regard is contrary to law and the purposes of the Act, and is therefore arbitrary, capricious and an abuse of the Board's statutory discretion.

WHEREFORE, petitioner prays that the Board's decision and order be modified to require that the unfair labor

practices be fully remedied and for such other and further relief as may be just and proper.

Respectfully submitted,

CARL L. TAYLOR

GEORGE R. MURPHY

1775 K Street, N.W.

Washington, D.C. 20006

Attorneys for Retail Clerks
Union, Local 1401,
Retail Clerks International
Association, AFL-CIO

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 24704

RETAIL CLERKS UNION, LOCAL No. 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

MOTION TO INTERVENE

To the Honorable Judges of the United States Court of
Appeals for the District of Columbia:

Zinke's Foods, Inc., by its attorneys, Davis, Kuelthau,
Vergeront & Stover, S.C., moves this Court for an order
granting said Company leave to intervene in this case and
in support thereof shows as follows:

1. Zinke's Foods, Inc. was the charged party in the
matter before the National Labor Relations Board now
on review before this Court. *Zinke's Foods, Inc.*, 185
NLBB No. 109.

2. A charged party has the right to intervene and
participate in this review proceeding involving the
Decision and Order of the National Labor Relations
Board. *International Union, United Automobile, Aero-
space and Agricultural Implement Workers of Amer-*

*ica, AFL-CIO, Local 283 v. Fafnir Bearing Company
et al*, 382 US 205 (1965).

WHEREFORE, Zinke's Foods, Inc. prays that this
Motion be granted.

Dated this 9th day of November, 1970.

Respectfully submitted,

Russ R. MUELLER

Attorney for Zinke's Foods, Inc.

Davis, Kuelthau, Vergeront
& Stover, S.C.
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

IN THE UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case Nos. 30-CA-372; 30-RC-400

ZINKE'S FOODS, INC.

and

RETAIL CLERKS UNION, LOCAL NO. 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

**MOTIONS FOR RECONSIDERATION AND TO
REOPEN THE RECORD IN THE ALTERNATIVE**

Zinke's Foods, Inc. hereinafter "Company" by its attorneys, Davis, Kuelthau, Vergeront & Stover, S.C. respectfully moves the Board to reconsider the Board's adoption of the Trial Examiner's finding that the Company's defense questioning the procedural adequacy of the Union's objections to the conduct of the election was not within the Trial Examiner's jurisdiction to decide and in the alternative to reopen the record to adduce additional evidence pertaining to employee turnover which is relevant to the question of whether the recognition and bargaining order is an appropriate remedy for the unfair labor practices in view of the substantial delay occasioned by the Board's consideration of the Trial Examiner's recommended order.

In support of the Motion for Reconsideration, the Company shows as follows:

1. The Company's sole defense to the refusal to bargain charge was that the results of the election conducted on March 16, 1966, in which the employees rejected the bargaining agency of the Retail Clerks Union Local No. 1401, Retail

Clerks International Association, AFL-CIO, hereinafter "Union", are conclusive and can not be set aside because the Union's objections to conduct affecting the results of the election were not in the form or substance required nor filed within the time permitted by Section 102.69 of the Board's Rules and Regulations (TXD p. 12, lines 5-10).

2. The Trial Examiner did not to rule on the issue because the question was "not within her jurisdiction to decide" (TXD p. 12, lines 12-21).

3. The Company excepted to the Trial Examiner's refusal to rule on the Company's defense. The Board's Decision and Order which issued on October 7, 1970, in these cases did not specifically mention the Trial Examiner's treatment of the Company's defense and, therefore, the Trial Examiner's conclusion in this regard fits within the Board's decision "adopt[ing] the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent herewith" (D3025, p. 2 slip opinion).

4. On or about October 12, 1970, the Union filed a Petition to Review an Order of the National Labor Relations Board with the United States Court of Appeals for the District of Columbia with relation to the Board's decision in these cases relative to the Union's claim for a damage remedy. The Board has not yet filed a cross-application for enforcement of the Decision and Order in the instant cases in relation to the Union's petition.

5. In view of the fact that the Company's principal defense to the validity of the recognition and bargaining order will be the Board's treatment of the claimed procedural defects of the Union's objections to the election, it is believed that the parties and the Court should have the benefit of a specific decision on the point by the Board.

WHEREFORE, it is requested that this Motion for Reconsideration be granted and, if granted, that the Board grant leave to the parties to file additional briefs to update

arguments in support of their respective positions on the question.

In support of the alternative Motion to Reopen the Record, the Company shows as follows:

1. The Union demanded recognition as bargaining agent by letter of February 14, 1966.

2. The Union filed a representation petition on February 21, 1966, in Case No. 30-RC-400.

3. Pursuant to said petition, a representational election was conducted on March 16, 1966, with the tally of ballots showing 10 votes rejecting the bargaining agency of the Union and 5 votes cast in the Union's favor.

4. The Union's objections to the election were attempted to be filed by two separate communications; namely, a telegram on March 21, 1966 and a letter dated March 24, 1966 and filed on March 28, 1966 (TXD p. 3, lines 31-45).

5. The Union filed unfair labor practice charges on April 1 and 13, 1966, docketed as Case No. 30-CA-372.

6. The Complaint and Notice of Hearing issued on May 16, 1966.

7. On May 18, 1966, the Regional Director issued a report and recommendation on the objections to conduct affecting the results of the election recommending the consolidation of the representation case with the unfair labor practice case for the purposes of hearing, ruling and decision by a Trial Examiner.

8. By order of June 2, 1966, the Board adopted the Regional Director's report and ordered a hearing.

9. The hearing was held before the Trial Examiner on July 6, 1966.

10. The Trial Examiner's decision issued on December 14, 1966.

11. The Company filed exceptions and supporting brief to the Trial Examiner's Decision on January 16, 1967.

12. On May 26, 1967, the Board issued a Notice of Hearing to receive oral argument relative to the propriety of adopting additional or new remedies for unlawful refusals to bargain in violation of Section 8(a)(5).

13. The hearings before the Board for oral argument pursuant to the notice were held on July 12-13, 1967.

14. The Board's Decision and Order in the instant cases issued on October 7, 1970.

15. Nearly five (5) years have elapsed since the date of the Union's demand for recognition upon which the pending recognition and bargaining order is based. Of the twenty-five (25) employees employed at the time of the demand, only three (3) remain as employees at the store at which the Union's recognition demand was directed. (See attached affidavit of Gordon F. Zinke, Secretary-Treasurer, attached hereto, marked Exhibit A, and made a part hereof.) In addition, the Company opened another store on April 28, 1970, in the Beloit, Wisconsin area known as Zinke's Shop-Rite No. 2 which employed twenty-five (25) employees as of the payroll period ending November 26, 1970. (Exhibit A.) Of that total, three were employees who were employed in February, 1966, at the store covered by the Union's demand for recognition. This additional store raises the possibility of an expanded appropriate unit which would include twice as many employees as contained in the appropriate unit at the time of the Union's demand for recognition.

16. The Board is solely responsible for the inordinate delay since the Trial Examiner's recommended order.

17. In situations, such as is present in the instant cases, where there is an unusually long delay and an almost complete turnover of employees during the passage of time resulting in a complete destruction of employee identity all of which is occasioned by the Board's inaction, a recognition and bargaining order is inappropriate and a repre-

sentation election should instead be conducted. *Clark's Gamble Corp. v. NLRB*, 422 F.2d 845 (CA-6, 1970), cert. den. U.S. (October 19, 1970), 64 LC ¶11225. See also, *NLRB v. Lou De Young's Market*, 430 F.2d 912 (CA-6, 1970), 75 LRRM 2129; *G.P.D., Inc. v. NLRB*, 430 F.2d 963 (CA-6, 1970), 74 LRRM 3057; and, *NLRB v. American Cable Systems, Inc.*, 427 F.2d 446 (CA-5, 1970).

18. In addition, the bargaining order will be subject to further delay which it is believed will be substantial in that the bargaining order is now subject to further appellate litigation because of the Union's appeal of the damage remedy in these cases. The Union's Petition for Review was filed with the United States Court of Appeals for the District of Columbia on or about October 12, 1970.

19. Under the circumstances of this case and on the authority cited herein, the Board should find the bargaining order inappropriate.

WHEREFORE, it is requested that this motion to Re-open the record be granted to establish the destruction of the continuity of employee identity since the demand for recognition was made by the Union in February, 1966, and to cause a representation election to be conducted so that the present employees are not stripped of their statutory right to determine bargaining agency.

Dated at Milwaukee, Wisconsin this 4th day of December, 1970.

Respectfully submitted,

DAVIS, KUELTHAU, VERGERONT
& STOVER, S.C.

By RUSS B. MUELLER
Attorneys for Zinke's Foods, Inc.

324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

EXHIBIT A
STATE OF WISCONSIN
COLUMBIA COUNTY

Re: Zinke's Foods, Inc., 185 NLRB No. 109
Board Case Nos. 30-CA-372, 30-RC-400

Gordon F. Zinke, being first duly sworn on oath, deposes and says:

1. He is the secretary and treasurer of Zinke's Foods Inc., a Wisconsin corporation engaged in the retail sale of grocery and related products, with its principal office and store at Wisconsin Dells, Wisconsin.

2. On February 15, 1966, which is the date of the demand for recognition by Retail Clerk's Union, Local No. 1401, affiliated with the Retail Clerk's International Association, AFL-CIO, there were twenty-five (25) employees in the bargaining unit determined to be appropriate by the Board in these proceedings which is composed of all full-time and regular part-time employees at the Beloit, Wisconsin, store exclusive of meat department employees, store manager, office clerical employees, and guards and supervisors at the store operated by the Company located at 1315 Madison Road, Beloit, and commonly known as Zinke's Shop-Rite No. 1, which is the store directly involved in the above-captioned cases.

3. On October 7, 1970, the date of the Board's decision in the above-captioned cases and as of the payroll period ending November 26, 1970, the said bargaining unit had a total employment of twenty-one (21) employees. Of the twenty-one (21) employees presently employed in the said bargaining unit, only 3 of them were employed in February, 1966.

4. On April 28, 1970, the Company opened another store located at 1877 Madison Road, Beloit, Wisconsin, which is commonly known as Zinke's Shop-Rite No. 2. There were twenty-nine (29) employees employed at this store in a bargaining unit as described in Paragraph 2 above on October 7, 1970, and twenty-five (25) employees as of the payroll period ending November 26, 1970. Of the total number of employees employed as of the payroll period ending November 26, 1970, at Zinke's Shop-Rite No. 2, only three (3) of them were employed in the month of February, 1966, at Zinke's Shop-Rite No. 1.

Affiant makes this affidavit in support of the Company's post decisional motions filed in Board Case Nos. 30-CA-124 and 30-RC-400.

Further affiant sayeth not.

GORDON F. ZINKE

Subscribed and sworn to before
me this 2nd day of December, 1970

SUZANNE S. WILLARD
Notary Public, Columbia County, Wisconsin

My commission expires : 8-26-73

**UNION'S RESPONSE TO RESPONDENT COMPANY'S
MOTIONS FOR RECONSIDERATION AND
REOPENING OF THE RECORD**

The Board's Decision in this proceeding issued on October 7, 1970. On December 7, 1970, Respondent Zinke's Foods, Inc. (hereafter the "Company") filed its "Motions for Reconsideration and to Reopen the Record in the Alternative." The Motions were served on counsel for the Union on December 10, 1970. The Union submits that the Company's Motions are totally lacking in merit and should be swiftly denied.

The Company's motion for reconsideration is based entirely on the previously rejected contention that the Union's election objections were not properly filed or put in the proper form. As the Trial Examiner noted, the Regional Director found no merit in this contention on May 18, 1966; and the Board, in the absence of exceptions, affirmed the Regional Director's ruling on June 2, 1966. TXD 3-4, 12. That the Company continues to press this "issue" and admits that this constitutes its "sole defense to the refusal to bargain charge" (Motions p. 1) underlines the frivolous nature of the Company's defenses throughout this proceeding.

The Company's motion to reopen the record is apparently founded on alleged employee turnover since the Company's unlawful refusal to bargain and on the "inordinate delay" allegedly attributable solely to the Board or the Union. This delay and turnover, the Company argues, renders the Board's bargaining order inappropriate, citing *Clark's Gamble Corp. v. N.L.R.B.*, 422 F.2d 845 (6th Cir. 1970), cert. denied 75 LRRM 2416 (October 19, 1970); *N.L.R.B. v. American Cable Systems, Inc.*, 427 F.2d 446 (5th Cir. 1970).

The Board has, with ample justification, rejected this argument. In *Gibson Products Co.*, 185 NLRB No. 74

(1970), the Board carefully analyzed the Supreme Court's opinion in *Gissel Packing*¹ and concluded:

[T]hat in determining whether the employer's unfair labor practices are of such a nature as to preclude a fair election and thus necessitate a bargaining order based on a past card showing of majority status, the situation must be appraised as of the time of the commission of the unfair labor practices, and not currently. For, in virtually every case, by the time a Board decision is reached, there is likely to be sufficient employee turnover and other changes to make it arguable, where the employer has meanwhile refrained from committing new unfair labor practices, that an election held now would be free of the taint of the old unfair labor practices. But, the union and the employees then supporting it were entitled to an election at an earlier time, and, if the employer's original unfair labor practices were of such a nature as to deprive them of an election at that time, to permit one now, when the union's support has been unlawfully dissipated, "would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain.' " *Gissel, supra*, 395 U.S. at 610.²

The Board's position in *Gibson Products* finds further support in *N.L.R.B. v. L. B. Foster Co.*, 418 F.2d 1 (9th Cir. 1969). The court there stated (*Id.* at p. 4):

The delay is not the fault of the union; if it is anyone's fault, it is that of the employer. But regardless of fault, it is an unfortunate but inevitable result of the process of hearing, decision and review prescribed in the Act. And to deny enforcement, with or without remand for reconsideration on the basis of facts occurring after

¹ *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969).

² As noted below, this is *not* a case in which the employer refrained from further unfair labor practices after the election. See TXD 8-11, 15.

the Board's decision, is to put a premium on continued litigation by the employer; it can hope that the resulting delay will produce a new set of facts, as to which the Board must then readjudicate. . . . When is the process to stop?

The Court added (418 F.2d at 5):

[T]he rapid turnover in the employer's personnel . . . is a reason to enforce. Otherwise, there will be an added inducement to the employer to indulge in unfair labor practices in order to defeat the union in the election. He will have as an ally, in addition to the attrition of union support inevitably springing from delay in accomplishing results, the fact that turnover will help him. . . .

See also *Bryant Chucking Grinder Co. v. N.L.R.B.*, 389 F.2d 565, 568 (2nd Cir. 1967), cert. denied 392 U.S. 908 (1968); *N.L.R.B. v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-265 (1969).

Moreover, the evidence provides overwhelming support for a bargaining order in this case. Prior to the Company's violations, the Union had the support of a clear majority of the employees—17 authorization cards from a unit of 26 employees. The Trial Examiner found that the Company engaged in "... a continuing antiunion campaign beginning shortly after the union demand, continuing and intensifying until shortly before the election" (TXD 14). In addition to that pre-election 8(a)(1) conduct, the Trial Examiner found the Company engaged in unlawful discrimination and unilateral wage increases after the election. It was the Examiner's opinion that there were "... few, if any cases of the present type in which the employer's unfair labor practices were as flagrant and there was a similar virtually total absence of any defense or attempted explanation or justification" (TXD 17). The Board adopted the Trial Examiner's findings, found that "Respondent's pattern of

unlawful conduct . . . was of such a nature as to have a lingering coercive effect", and concluded that a bargaining order would effectuate the policies of the Act (p. 3). Even assuming *arguendo* that *Clark's Gamble* was good law for those facts, that decision clearly would not militate against a bargaining order for the flagrant and pervasive violations found here. See *G.P.D., Inc. v. N.L.R.B.*, 430 F.2d 963, 964-965 (6th Cir. 1970); *N.L.R.B. v. Lou Young's Market Basket, Inc.*, 430 F.2d 912, 915 (6th Cir. 1970). In short, there is no merit in the Company's assertion that turnover and delay have eliminated the basis for the Board's bargaining order.

In its motion for reopening the Company implies that the Union's review proceedings to contest the Board's denial of an additional 8(a)(5) remedy subjects the bargaining order to further delay. (Motions p. 6.) This is not the case. On October 13, 1970, the Union wrote the Company stating that the Union was "willing and ready to commence negotiations for a contract." However, the Company has not accepted this offer to begin bargaining. Thus, it is the Company's own delay and non-compliance, not the Union's review proceeding, which obstructs implementation of the Board's bargaining order.

In sum, the Union requests that the Board deny the Company's Motions as completely lacking in merit.

Respectfully submitted,

CARL L. TAYLOR

1775 K Street, N.W.

Washington, D.C. 20006

223-3118

Attorney for Charging Party

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Union's Response to Respondent Company's Motions for Reconsideration and Reopening of the Record" was mailed, postage prepaid, this 15th day of December, 1970, to each of the following:

Zinke's Foods, Inc.
1315 Madison Road
Beloit, Wisconsin

Russ R. Mueller, Esquire
Davis, Kuelthan, Vergeront & Stover
720 Wells Building
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Arnold Ordman, Esquire
General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

George F. Squillacote, Director
Region 30
National Labor Relations Board
2nd Floor Commerce Building
744 North 4th Street
Milwaukee, Wisconsin 53203

CARL L. TAYLOR
1775 K Street, N.W.
Washington, D.C. 20006
223-3118
Attorney for Charging Party

DAVIS, KUELTHAU, VERGEMENT & STOVER, S. C. RECEIVED

ATTORNEYS AT LAW
304 EAST WISCONSIN AVENUE
MILWAUKEE, WISCONSIN 53202AREA CODE 414
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DEC 2 1970

FAX

OF COUNSEL:
C. CARL KUELTHAU
MARKET S. STOVERVALERIE S. DAVIS
JOHN G. VERGEMENT
MARKET S. STOVER, JR.
CARL R. KUELTHAU
ROBERT S. KUELTHAU
DAVID S. MUELLER
DAVID E. LEONTHUS
JOHN P. SWANE
THOMAS L. METCALF
THOMAS S. BOYER
DAVID J. VERGEMENT

December 21, 1970

Mr. Ogden W. Fields,
Executive Secretary
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D. C. 20570Re: Zinke's Foods, Inc.
Case No. 30-CA-372
Board post decisional file

Dear Mr. Fields:

Please find enclosed for filing with the pending Motions by Zinke's Foods, Inc., a letter of December 21, 1970 to the local Union relative to the Union's reference in their reply to the Motions to an October 13, 1970 letter of demand for negotiations.

Very truly yours,

DAVIS, KUELTHAU, VERGEMENT
& STOVER, S. C.

By

Mark S. Mueller

RRM:lo

enc.

cc: Robert Kelly, Esq.
✓ Carl L. Taylor, Esq.
Gordon F. Zinke

DAVIS, KUELTHAU, VERGERONT & STOVER, S. C.

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OF COUNSEL
S. CARL KUELTHAU
HARVEY S. STOVER

December 21, 1970

Mr. William A. Moreth,
Secretary-Treasurer
Retail Clerks Union, Local 1401
301 East Johnson Street
Madison, Wisconsin 53703

Re: Zinke's Foods, Inc.
Case No. 30-CA-373
Board post decisional file

Dear Mr. Moreth:

Your letter of October 13, 1970, advising Zinke's Foods, Inc. that your Union was ready to commence negotiations for a labor contract came to my attention upon receipt on December 18, 1970, of the Union's reply to our post decisional motions filed with the Board on December 7, 1970. I immediately contacted the client for an explanation of the circumstances surrounding the alleged existence of that letter and was just today advised by the client that Mr. Gordon Zinke was not aware of the letter until he had received my inquiry of the other day. Upon receipt of my inquiry, Mr. Zinke searched his files containing the many documents which have accumulated since the Board's decision in this case last fall and found your letter, which as I stated above, was referred to in the Union's reply to our motion. This letter was misplaced for the reason that all documents relating to this matter which are sent directly to the store in Beloit, Wisconsin, have to be forwarded by the manager to Mr. Zinke in Wisconsin Dells. This letter was no exception and it then became lost among other documents from the regional office of the Board which were mailed to Mr. Zinke at the same time as your letter. If this set of circumstances caused you any trouble, we certainly apologize for the same.

Mr. William A. Moreth
 Secretary-Treasurer
 Retail Clerks Union, Local 1401

Page 2.

December 21, 1970

At this point, rather than attempt to reconstruct what the client's reply would have been back in October to your letter of October 13, 1970, we now advise that your request for negotiations cannot now be considered in view of our pending motions which place in question the validity of that portion of the Board's Order which requires recognition and bargaining with your Union. Even beyond that, your Union's pending appeal before the Circuit Court of Appeals for the District of Columbia of the question concerning the adequacy of the remedy issues will apparently preclude any further consideration of compliance with the Board's Order in its present form, until such time as that litigation is finally concluded.

Very truly yours,

DAVE, KUELTHAU, VERGERONT
 & STOVER, S. C.

By


 David K. Kuelthau

RRM:de

cc: Robert Kelly, Esq.
 ✓ Carl L. Taylor, Esq.
 Ogden W. Fields
 Gordon F. Zinke

ORDER DENYING MOTIONS

On October 7, 1970, the National Labor Relations Board issued a Decision and Order¹ in the above-entitled proceeding in which it found, *inter alia*, that the Respondent, by refusing to recognize and bargain with the Union, violated Section 8(a)(5) of the Act. The Board ordered that the Respondent cease and desist therefrom and take certain affirmative action to remedy such unfair labor practice.

Thereafter, on December 7, 1970, Respondent filed Motions for Reconsideration and to Reopen the Record in the Alternative, contending that the results of the election conducted on March 16, 1966, in which the employees rejected the bargaining agency of the Retail Clerks Union Local No. 1401, Retail Clerks International Association, AFL-CIO, are conclusive and cannot be set aside because the Union's objections to conduct affecting the results of the election were not in the form or substance required nor filed within the time permitted by Section 102.69 of the Board's Rules and Regulations. Therefore, Respondent requested that the Motion for Reconsideration be granted, and, if granted, that the Board grant leave to the parties to file additional briefs in support of their respective positions, or, in the alternative, that the Motion to Reopen the record be granted to consider the continuing appropriateness of the unit, to establish the destruction of the continuity of employee identity since the demand for recognition was made by the Union in February, 1966, and to cause a representation election to be conducted.

Thereafter, on December 16, 1970, the Union filed a Response to Company's Motions, submitting that the motions are totally lacking in merit, and should be denied.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Respondent's

¹ 185 NLRB No. 109.

Motions be, and they hereby are, denied for lack of jurisdiction inasmuch as the record has been filed with the United States Court of Appeals for the District of Columbia. However, if the Board had jurisdiction, it would deny the motions as lacking in merit.

Dated, Washington, D.C., January 6, 1971

By direction of the Board:

GEORGE A. LEET

Associate Executive Secretary

185 NLRB No. 20

D-625
Elwood, Ind.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD

Case 25-CA-2377

EX-CELL-O CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

DECISION AND ORDER

On March 2, 1967, Trial Examiner Owsley Vose issued his Decision in the above-entitled proceeding, finding that Respondent Ex-Cell-O Corporation had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, including an order directing the Respondent to make whole its employees for any losses suffered on account of its unlawful refusal to bargain with the UAW (the Charging Party), as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief, together with a request for oral argument. As the compensatory remedy adopted by the Trial Examiner in this case poses several novel issues of importance, the National Labor Relations Board granted oral argument and consolidated this matter for purposes of said argument with three other cases involving the same

or related issues (*Zinke's Foods, Inc.*, 30-CA-372; *Herman Wilson Lumber Company*, 26-CA-2536; *Rasco Olympia, Inc. d/b/a Rasco* 5-10-25 cents, 19-CA-3187).

The Board granted a number of motions for permission to file briefs *amicus curiae* and also invited certain other interested parties to file them and to participate in the oral argument which was held on July 12 and 13, 1967. The parties who submitted amicus briefs and participated as such in the argument were: The Chamber of Commerce of the United States, the National Association of Retail Merchants, The American Federation of Labor and Congress of Industrial Organizations, and The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Amicus briefs were also submitted by the National Association of Manufacturers, Preston Products Company, Inc., and The NAACP Legal Defense and Educational Fund, Inc.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, the briefs of the parties and those submitted *amicus curiae*, the oral arguments made before the Board, and the record in the proceeding, and adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.¹

This case began with the UAW's request for recognition on August 3, 1964. Ex-Cell-O refused the Union's request on August 10, 1964, and the Union immediately filed a petition for Certification of Representative. After a hearing the Regional Director ordered an election, which was held

¹ The Respondent's motion, filed on August 19, 1970, seeking dismissal of the complaint herein is denied. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 610; *N.L.R.B. v. Katz*, 369 U.S. 736, 748, fn. 16; *Franks Bros. Co. v. N.L.R.B.*, 321 U.S. 702. See also *N.L.R.B. v. Rutter-Rex Manufacturing Company, Inc.*, 396 U.S. 258.

on October 22, 1964, and a majority of the employees voted for the Union. The Company, however, filed objections to the conduct of the election, alleging that the Union made certain misrepresentations which assertedly interfered therewith, but the Acting Regional Director, in a Supplemental Decision of December 29, 1964, overruled them. The Company then requested review of that decision, which the Board granted, and a hearing was held on May 18 and 19, 1965. The Hearing Officer issued his Report on Objections on July 15, 1965, and recommended that the objections be overruled. The Company filed exceptions thereto, but on October 28, 1965, the Board adopted the Hearing Officer's findings and recommendations and affirmed the Regional Director's certification of the Union.

The day after the Board's certification was issued, the Company advised the Union that it would refuse to bargain in order to secure a court review of the Board's action² and later reiterated this position after receiving the Union's request for a bargaining meeting. The Union thereupon filed the 8(a)(1) and (5) charge in this case and the complaint was issued on November 23, 1965. The Respondent's answer admitted the factual allegations of the complaint but denied the violation on the ground that the Board's certification was invalid. The hearing herein, originally scheduled for February 15, 1966, commenced on June 1, 1966;³ it was adjourned until June 29, 1966, to permit the Union to offer evidence supporting its request for a compensatory remedy for the alleged refusal to bar-

² The Company's letter stated that:

We have received the Labor Board's decision concerning our objections to the conduct of the union election held October 22, 1964. As you know, the only way the Labor Board's decision in this case can be reviewed is through a technical refusal to bargain, and consequently we are unable to meet with you and bargain until the review procedure is carried out.

³ This delay was caused by Respondent's unsuccessful attempt to subpoena the Regional Director's files in the representation case.

gain; the hearing was postponed again until July 28, 1966.⁴ The Company also petitioned the United States District Court for an injunction against the Regional Director and the Trial Examiner to restrain the latter from closing the hearing until the Regional Director had produced the investigative records in the representation case. The court issued a summary judgment denying the injunction on December 13, 1966, and on December 21, 1966, the Trial Examiner formally closed his hearing. On March 2, 1967, the Trial Examiner issued his Decision, finding that the Company had unlawfully refused to bargain in violation of Section 8(a)(5) and (1) of the Act and recommended the standard bargaining order as a remedy. In addition the Trial Examiner ordered the Company to compensate its employees for monetary losses incurred as a result of its unlawful conduct.

It is not disputed that Respondent refused to bargain with the Union, and we hereby affirm the Trial Examiner's conclusion that Respondent thereby violated Section 8(a)(1) and (5) of the Act. The compensatory remedy which he recommends, however, raises important issues concerning the Board's powers and duties to fashion appropriate remedies in its efforts to effectuate the policies of the National Labor Relations Act.

It is argued that such a remedy exceeds the Board's general statutory powers. In addition, it is contended that it cannot be granted because the amount of employee loss, if any, is so speculative that an order to make employees whole would amount to the imposition of a penalty. And the position is advanced that the adoption of this remedy

⁴ This postponement grew out of the Company's objections to the authenticity of certain collective-bargaining contracts offered by the Union to substantiate its request for a compensatory remedy. The Company later withdrew its objection. It also refused to comply with a *subpoena duces tecum* requesting production of certain records relating to wage increases and fringe benefits.

would amount to the writing of a contract for the parties, which is prohibited by Section 8(d).⁵

We have given most serious consideration to the Trial Examiner's recommended financial reparations Order, and are in complete agreement with his finding that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from a loss of employee support attributable to such delay. The inadequacy of the remedy is all the more egregious where, as in the recent *N.L.R.B. v. Tiidee Products, Inc.*,⁶ case, the court found that the employer had raised "frivolous" issues in order to postpone or avoid its lawful obligation to bargain. We have weighed these considerations most carefully. For the reasons stated below, however, we have reluctantly concluded that we cannot approve the Trial Examiner's Recommended Order that Respondent compensate its employees for monetary losses incurred as a consequence of Respondent's determination to refuse to bargain until it had tested in court the validity of the Board's certification.

Section 10(c) of the Act directs the Board to order a person found to have committed an unfair labor practice to cease and desist and "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." This

⁵ 94 Stat. 454 (1935), as amended, 29 U.S.C. § 158(d) (1958): "but such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession. . . ."

⁶ F.2d (C.A.D.C., April 3, 1970).

authority, as our colleagues note with full documentation, is extremely broad and was so intended by Congress. It is not so broad, however, as to permit the punishment of a particular respondent or a class of respondents. Nor is the statutory direction to the Board so compelling that the Board is without discretion in exercising the full sweep of its power, for it would defeat the purposes of the Act if the Board imposed an otherwise proper remedy that resulted in irreparable harm to a particular respondent and hampered rather than promoted meaningful collective bargaining. Moreover, as the Supreme Court recently emphasized, the Board's grant of power does not extend to compelling agreement. (*H. K. Porter Co., Inc. v. N.L.R.B.*, 397 U.S. 99.) It is with respect to these three limitations upon the Board's power to remedy a violation of Section 8(a)(5) that we examine the UAW's requested remedy in this case.

The Trial Examiner concluded that the proposed remedy was not punitive, that it merely made the employees partially whole for losses occasioned by the Respondent's refusal to bargain, and was much less harsh than a backpay order for discharged employees, which might require the Respondent to pay wages to these employees as well as their replacements. Viewed solely in the context of an assumption of employee monetary losses resulting directly from the Respondent's violation of Section 8(a)(5), as what is finally determined in court, the Trial Examiner's conclusion appears reasonable. There are, however, other factors in this case which provide counter weights to that rationale. In the first place, there is no contention that this Respondent acted in a manner flagrantly in defiance of the statutory policy. On the contrary, the record indicates that this Respondent responsibly fulfills its legally established collective-bargaining obligations. It is clear that Respondent merely sought judicial affirmance of the Board's decision that the election of October 22, 1964, should not be set aside on the Respondent's objections. In the past

whenever an employer has sought court intervention in a representation proceeding the Board has argued forcefully that court intervention would be premature, that the employer had an unquestioned right under the statute to seek court review of any Board order before its bargaining obligation became final. Should this procedural right in 8(a)(5) cases be tempered by a large monetary liability in the event the employer's position in the representation case is ultimately found to be without merit? Of course, an employer or a union, which engages in conduct later found in violation of the Act, does so at the peril of ultimate conviction and responsibility for a make-whole remedy. But the validity of a particular Board election tried in an unfair labor practice case is not, in our opinion, an issue on the same plane as the discharge of employees for union activity or other conduct in flagrant disregard of employee rights. There are wrongdoers and wrongdoers. Where the wrong in refusing to bargain is, at most, a debatable question, though ultimately found a wrong, the imposition of a large financial obligation on such a respondent may come close to a form of punishment for having elected to pursue a representation question beyond the Board and to the courts. The desirability of a compensatory remedy in a case remarkably similar to the instant case was recently considered by the Court of Appeals for the District of Columbia in *United Steelworkers [Quality Rubber Manufacturing Company, Inc.] v. N.L.R.B.*, F.2d (July 10, 1970). There the court, distinguishing *Tiidee Products, supra*, indicated that the Board was warranted in refusing to grant such a remedy in an 8(a)(5) case where the employer "desired only to obtain an authoritative determination of the validity of the Board's decision." It is not clear whether the court was of the opinion that the requested remedy was within the Board's discretion or whether it would have struck down such a remedy as punitive in view of the technical nature of the respondent's unfair labor practice. In any event, we find ourselves in disagreement

with the Trial Examiner's view that a compensatory remedy as applied to the Respondent in the instant case is not punitive "in any sense of the word."

In *Tiidee Products* the court suggested that the Board need not follow a uniform policy in the application of a compensatory remedy in 8(a)(5) cases. Indeed, the court noted that such uniformity in this area of the law would be unfair when applied "to unlike cases." The court was of the opinion that the remedy was proper where the employer had engaged in a "manifestly unjustifiable refusal to bargain" and where its position was "palpably without merit."⁷ As in *Quality Rubber*, the court in *Tiidee Products* distinguished those cases in which the employer's failure to bargain rested on a "debatable question." With due respect for the opinion of the Court of Appeals for the District of Columbia, we cannot agree that the application of a compensatory remedy in 8(a)(5) cases can be fashioned on the subjective determination that the position of one respondent is "debatable" while that of another is "frivolous." What is debatable to the Board may appear frivolous to a court, and vice versa.⁸ Thus, the debatability of the employer's position in an 8(a)(5) case would itself become a matter of intense litigation.

We do not believe that the critical question of the employer's motivation in relaying bargaining should depend so largely on the expertise of counsel, the accident of circumstances, and the exigencies of the moment.

In our opinion, however, the crucial question to be determined in this case relates to the policies which the request-

⁷ In these cases, at least, it would seem incumbent on the Board to utilize to the fullest extent its authority under Section 10(j) and (e) of the Act, thereby minimizing the pernicious delay in collective bargaining and consequent loss of benefits to the employees affected. See also Justice Harlan's concurrence in *H. K. Porter, supra*.

⁸ Cf. *N.L.R.B. v. Magnesium Casting Co.* F.2d (C.A. 1, May 21, 1970).

ed order would effectuate. The statutory policy as embodied in Section 8(a)(5) and (d) of the Act was considered at some length by the Supreme Court in *H. K. Porter Co., Inc. v. N.L.R.B.*, *supra*. There the Court held that the Board had power to require employers and employees "to negotiate" but that the Board was without power to compel a company or a union "to agree to any substantive contractual provision of a collective bargaining agreement." The purpose of the Act, the Court held, was to ensure that employers and their employees "work together to establish mutually satisfactory conditions." The Court noted that Congress was aware that agreement between employers and unions might not always be reached, that agreement might in some cases be impossible, or thwarted by strikes and lockouts. But it was never intended, the Court held, that the Government in such cases step in and become a party to the negotiations. Recognizing that the Board's remedial powers might be insufficient to cope with important labor problems, the Supreme Court nevertheless struck down an order requiring the respondent employer involuntarily to agree to a specific contractual provision. It was the job of Congress, not the Board or the courts, Justice Black wrote, "to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands."

It is argued that the instant case is distinguishable from *H. K. Porter* in that here the requested remedy merely would require an employer to compensate employees for losses they incurred as a consequence of their employer's *failure to agree* to a contract he *would* have agreed to if he had bargained in good faith. In our view, the distinction is more illusory than real. The remedy in *H. K. Porter* operates prospectively to bind an employer to a specific contractual term. The remedy in the instant case operates retroactively to impose financial liability upon an employer flowing from a *presumed* contractual agreement. The Board

infers that the latter contract, though it never existed and does not and need not exist, was *denied* existence by the employer because of his refusal to bargain. In either case the employer has not agreed to the contractual provision for which he must accept full responsibility *as though he had agreed to it*. Our colleagues contend that a compensatory remedy is not the "writing of a contract" because it does not "specify new or continuing terms of employment and does not prohibit changes in existing terms and conditions." But there is no basis for such a remedy unless the Board finds, as a matter of fact, that a contract would have resulted from bargaining. The fact that the contract, so to speak, is "written in the air" does not diminish its financial impact upon the recalcitrant employer who, willy-nilly, is forced to accede to terms never mutually established by the parties. Despite the admonition of the Supreme Court that Section 8(d) was intended to mean what it says, i.e., that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession," one of the parties under this remedy is forced by the Government to submit to the other side's demands. It does not help to argue that the remedy could not be applied unless there was substantial evidence that the employer would have yielded to these demands during bargaining negotiations. Who is to say in a specific case how much an employer is prepared to give and how much a union is willing to take? Who is to say that a favorable contract would, in any event, result from the negotiations? And it is only the employer of such good will as to whom the Board might conclude that he, at least, would have given his employees a fair increase, who can be made subject to a financial reparations order; should such an employer be singled out for the imposition of such an order? To answer these questions the Board would be required to engage in the most general, if not entirely speculative, inferences to reach the conclusion that employees

were deprived of specific benefits as a consequence of their employer's refusal to bargain.

Much as we appreciate the need for more adequate remedies in 8(a)(5) cases, we believe that, as the law now stands, the proposed remedy is a matter for Congress, not the Board. In our opinion, however, substantial relief may be obtained immediately through procedural reform, giving the highest possible priority to 8(a)(5) cases combined with full resort to the injunctive relief provisions of Section 10(j) and (e) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ex-Cell-O Corporation, Elwood, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees in the appropriate unit as set forth in the attached Trial Examiner's Decision.

(b) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request recognize and bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees in the appropriate unit. The appropriate unit is:

All production and maintenance employees, including

tool crib store employees, shipping and receiving and follow-up employees, but excluding all office clerical and plant clerical employees, all professional employees, guards, and supervisors.

(b) Post at its Elwood, Indiana, plant copies of the attached notice marked "Appendix."⁹ Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 25, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., Aug. 25, 1970.

EDWARD B. MILLER, Chairman

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

⁹ In the event this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Members McCulloch and Brown, dissenting in part:

Although concurring in all other respects in the Decision and Order of the Board, we part company with our colleagues on the majority in that we would grant the compensatory remedy recommended by the Trial Examiner. Unlike our colleagues, we believe that the Board has the statutory authority to direct such relief and that it would effectuate the policies of the Act to do so in this case.

Section 10(c) of the Act directs the Board to remedy unfair labor practices by ordering the persons committing them to cease and desist from their unlawful conduct "and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . ." ¹⁰ The phrase "affirmative action" is nowhere qualified in the statute, except that such action must "effectuate the policies of this Act," and indicates the intent of Congress to vest the Board with remedial powers coextensive with the underlying policies of the law which is to be enforced. This provision "did not pass the Wagner Act Congress without objection to the uncontrolled breadth of this power." ¹¹

But the broad language survived the challenge.

The contention made by the Respondent herein that legislative history requires a narrow construction of the Board's remedial powers under Section 10(c) focuses on the deletion of the word "restitution" by the Senate and House Committees in reporting the original bills and their substitution therefor of the language: "including reinstatement . . . with or without back pay." ¹² It is argued that because

¹⁰ 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(c) (1958).

¹¹ *Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO [Mechanical Handling Systems] v. N.L.R.B.*, 365 U.S. 651, 657 (concurring opinion).

¹² Compare 1 Legislative History of the National Labor Relations Act, 1935 at 1302 with 2 Legislative History of the National Labor Relations Act, 1935 at 2292.

this change was made after a Senate Committee print asserted that "express language such as reinstatement, backpay, etc., necessarily results in narrowing the definition of restitution,"¹³ the subsequent deletion and substitution evidence congressional intent to restrict the Board's remedial power. This interpretation of the legislative history is negated by a closer look at the status of the Senate Committee print, and the statement of Senator Wagner, the author of the legislation, respecting the scope of the Board's remedial power under the present language of Section 10(c).

The assertion that substitution of the illustrative language "including reinstatement . . . with or without back pay" would narrow the definition of restitution was contained in an unsigned staff memorandum prepared for use by the Senate Committee. Whatever the status of such a document for purposes of legislative interpretation, it does not by itself prove congressional intent, especially when it is relied on, as here, to dispute the plain meaning of the statutory language.¹⁴ Further, after the Wagner Act had

¹³ 1 Legislative History of the National Labor Relations Act, 1935 at 1360.

¹⁴ "Restitution" is a term of art used and misused in both common law and equity to describe particular techniques for judicial enforcement and maintenance of rights, and is distinguishable conceptually, but not always realistically, from damages and specific performance. Thus, the term is imprecise both in meaning and application. See, for example, Corbin, *Contracts*, §§ 1102-1103, 1107; Williston, *Contracts* §§ 1454, 1482-1483. Indeed, the American Law Institute's Restatement of the Law of Restitution does not include remedies for torts such as ejectment, replevin, or trover, even though restitutionary in nature, and most significantly that Restatement recites that it "does not present the circumstances under which an action can be maintained . . . for a failure to perform an official, customary or statutory duty to pay money. . . ." Restatement, *Restitution* at 2-3. Dean Roscoe Pound made a comparable distinction in his treatise on jurisprudence in emphasizing that administrative modes for the enforcement and maintenance of rights deserve separate treatment from judicial techniques.

been reported out of committee with the present language of Section 10(c), Senator Wagner stated, in floor debates, that under its provisions "the Board will be empowered to issue orders forbidding violations of the law and making restitution to those who have been injured thereby."¹⁵ Clearly, although the legal phrase had been eliminated from the Act, its sponsor's intent was not thereby to narrow the concept of the Board's remedial powers. And, this broad construction of Section 10(c) has long been accepted by the courts.

The Supreme Court, in its consideration of the Board's remedial powers, has consistently interpreted Section 10(c) as allowing the board wide discretion in fashioning remedies. Thus, in *Phelps Dodge Corp. v. N.L.R.B.*,¹⁶ the Court stated that:

Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.

The need for such broad remedial authority was obvious, for, as the Court went on to say:

. . . Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of spe-

Pound, *Jurisprudence* at 351 (1959). From this background it is apparent that inclusion of the term "restitution" in Section 10(c) would not have been appropriate to illustrate a broad flexible administrative remedy, and its deletion is readily understandable as a matter of draftsmanship.

¹⁵ 2 Legislative History of the National Labor Relations Act, 1935 at 2332.

¹⁶ 313 U.S. 177, 187-189.

cific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration.¹⁷

The declared policy of the Act is to promote the peaceful settlement of disputes by encouraging collective bargaining and by protecting employee rights.¹⁸ To accomplish this purpose, Board remedies for violations of the Act should, on one hand, have the effect of preventing the party in violation from so acting in the future, and from enjoying any advantage he may have gained by his unlawful practices.¹⁹ But they must also presently dissipate the effects of violations on employee rights²⁰ in order that the employees so injured receive what they should not have been denied.²¹ A Board order so devised is to be enforced by the courts "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."²²

¹⁷ *Id.* at 194.

¹⁸ 49 Stat. 552 (1935), as amended, 29 U.S.C. § 151 (1958).

¹⁹ *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 364.

²⁰ See, e.g., *Franks Bros. Company v. N.L.R.B.*, 321 U.S. 702, 704; *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257. ("The purpose of the Act is to promote the peaceful settlement of disputes by providing legal remedies for the invasion of employee rights.")

²¹ *International Brotherhood of Operative Potters [Aztec Ceramics Co.] v. N.L.R.B.*, 320 F.2d 757 761 (C.A.D.C.), *enfg.* in part and remanding in part 138 NLRB 1178; *Leeds & Northrup Co. v. N.L.R.B.*, 391 F.2d 874 (C.A. 3), *enfg.* 162 NLRB 987.

²² *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216, citing with approval *Virginia Electric and Power Co. v. N.L.R.B.*, 319 U.S. 533, 540. In *Consolo v. Federal Maritime Commission*, 383 U.S. 607, the Supreme Court upheld a compensatory award by that Commission, which, like the Board, is among a number of administrative agencies that may grant compensatory remedies. See 39 Stat. 736, as amended, 46 U.S.C. § 821 (1964), which states that the Commission "may direct payment . . . of full reparation to the complainant for the

Deprivation of an employee's statutory rights is often accompanied by serious financial injury to him. Where this is so, an order which only guarantees the exercise of his rights in the future often falls far short of expunging the effects of the unlawful conduct involved. Therefore, one of the Board's most effective and well-established affirmative remedies for unlawful conduct is an order to make employees financially whole for losses resulting from violations of the Act.²³ Various types of compensatory orders have been upheld by the Supreme Court in the belief that "Making the workers whole for losses suffered on account of an unfair practice is part of the vindication of the public policy which the Board enforces."²⁴ The most familiar of these is the backpay order used to remedy the effect of employee discharges found to be in violation of Section 8(a)(3) of the Act.²⁵ While the cease-and-desist and reinstatement orders remedy the denial of the aggrieved employee's rights and protect the prospective exercise there-

injury caused by such violation." There the petitioner had also suffered financial loss because of the respondent's statutory violation, and the Court, relying heavily on cases involving this Board, stated (383 U.S. at 620-621) that Congress was very deliberate in limiting judicial review of agency determinations because:

It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and its helps promote the uniform application of the statute. These policies are particularly important when a court is asked to review an agency's fashioning of discretionary relief. In this area agency determinations frequently rest upon a complex and hard-to-review mix of considerations. By giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise. . . .

²³ *Virginia Electric and Power Company v. N.L.R.B.*, *supra* at 544.

²⁴ *Phelps Dodge Corp. v. N.L.R.B.*, fn. 16, *supra* at 197.

²⁵ This remedy has been ordered since the Board reported its first case in 1935. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, *enfd.* 303 U.S. 261.

of, the backpay order repairs the financial losses which have been suffered, and, in thus making the employee whole,²⁶ serves to recreate, as fully as possible, the conditions and relationships that would have been, had there been no unfair labor practice.²⁷

As a result of its experience over the years, the Board has made modifications in its backpay orders to make them more effective. Thus, in *Isis Plumbing & Heating Co.*,²⁸ the Board ordered that interest at 6 percent be added to the reimbursement of wages lost by employees as a result of a respondent's wrong, in order to achieve a more equitable result and to encourage compliance with Board orders. The U.S. Court of Appeals for the District of Columbia, in upholding the Board's power to award such compensation, noted that even though the Board has waited for about 25 years to employ the interest mechanism, it could not close its eyes to the realities of the employees' position, and that in the evaluation of the law of remedies "some things are bound to happen for the 'first time.'"²⁹

An earlier example of such modification occurred in *F. W. Woolworth Company*,³⁰ after the Board became aware that in numerous cases, after a long period of unemployment following their discriminatory discharges, employees suc-

²⁶ Cf. *Nathanson v. N.L.R.B.*, 344 U.S. 25; *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398 (concurring opinion of Mr. Justice Frankfurter).

²⁷ *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, *supra* (concurring opinion of Mr. Justice Harlan); *Leeds & Northrup Co. v. N.L.R.B.*, *supra*.

²⁸ 138 NLRB 716.

²⁹ *International Brotherhood of Operative Potters v. N.L.R.B.*, *supra* at 761. See *ABC Air Freight Co., Inc. v. C.A.B.*, 391 F.2d 295 (C.A. 2), concerning the need for flexibility.

³⁰ 90 NLRB 289.

ceeded in obtaining higher paying jobs. With the type of backpay order then in effect, some employers secured an advantage by being dilatory and refraining from offering reinstatement, for greater delay meant a progressive reduction or even complete elimination of backpay due. Further, employees who saw this steady reduction of their backpay would waive their right to reinstatement in order to toll the running of the period and freeze the amount of backpay owing at the highest possible amount. In *Woolworth*, the Board countered this stratagem of delay by ordering that backpay be computed on a quarterly basis, with the earnings in one particular quarter having no effect upon the backpay liability for any other quarter. The Supreme Court upheld the new method of compensation in *N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc.*,³¹ and stated that it is the function of the Board to give coordinated effect to the policies of the Act. The Court further indicated that in consideration of the practical interplay of the individual remedies of backpay and reinstatement, "both of which are within the scope of its authority," the Board may fashion one so that it complements, rather than conflicts with, the other.³²

It is clear from the Act that the Board's compensatory remedies need not be limited to the above situations, and the courts have always interpreted the phrase "with or without back pay" as being merely an illustrative example of the general grant of power to award affirmative relief.³³ The Board, with judicial approval, has also employed make-whole orders to remedy various other types of violations of the Act. In *Virginia Electric and Power Company v. N.L.R.B.*, *supra*, for example, the Supreme Court upheld a

³¹ 344 U.S. 344.

³² *Id.* at 348.

³³ See, e.g., *Virginia Electric and Power Co. v. N.L.R.B.*, *supra* at 539; *Radio Officer's Union v. N.L.R.B.*, 347 U.S. 17, 54; *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 187-189.

Board order directing the employer to make whole its employees for dues checked off in favor of a company-dominated union. The Court's rationale in part was that "Like a backpay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices," and that "... both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act. . . ." ²⁴

The Board has already recognized in certain refusal-to-bargain situations that the usual bargaining order is not sufficient to expunge the effects of an employer's unlawful and protracted denial of its employees' right to bargain. Though the bargaining order serves to remedy the loss of the legal right and protect its exercise in the future, it does not remedy the financial injury which may also have been suffered. In a number of situations the Board has ordered the employer who unlawfully refused to bargain to compensate its employees for their resultant financial losses. Thus, some employers unlawfully refuse to sign after an agreement. The Board has in these cases ordered the employer to execute the agreement previously reached and, according to its terms, to make whole the employees for the monetary losses suffered because of the unlawful delay in its effectuation. ²⁵

²⁴ *Supra* at 543.

²⁵ See, e.g., *Schill Steel Products, Inc.*, 161 NLRB 939; *Huttig Sash and Door Co.*, 151 NLRB 470, *enfd.* in part 362 F.2d 217 (C.A. 4). Cf. *N.L.R.B. v. George E. Light Boat Storage, Inc.*, 373 F.2d 762 (C.A. 5), where the court of appeals enforced the Board's compensatory order which compelled the employer to reimburse employees for back overtime and welfare payments according to the terms of the contract which was unlawfully repudiated in violation of Section 8(a)(5). The Court noted that:

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A simple order to bargain in good faith would not be sufficient. To allow an employer unlawfully to repudiate a collective-bargaining agreement at the small cost of being required, sometime in the

Similarly, in *American Fire Apparatus Co.*,³⁶ the employer violated Section 8(a)(5) by unilaterally discontinuing payment of Christmas bonuses, and the Board concluded that only by requiring the bonuses to be paid could the violation be fully remedied. The Court of Appeals for the Eighth Circuit in enforcing the order commented "Nor do we believe that the difficulty in computing the precise amount due each employee is a substantial reason for modifying the Board's order." In *Leeds & Northrup Co. v. N.L.R.B.*, *supra*, which involved a related problem, the Court of Appeals for the Third Circuit reached a similar conclusion. There, the employer unilaterally altered its formula for computing its annual profit-sharing bonus. The Board found that a violation of Section 8(a)(5) had occurred and ordered payment to the employees of the difference between what they had received and the amount they would have been paid under the prior method of computation. In enforcing that order, the court stated:

The Board's backpay award in this case is supportable on the ground that the union might have successfully resisted all or a portion of the reduction in its share of profits had it been afforded an opportunity to bargain, and the employees should not be left in a worse position than they might have enjoyed if the union had been given the opportunity to bargain. While it is true that a retroactive order might afford the em-

future, to sit down and bargain with the union would encourage such violations of the Act. For the period from the breach until a new agreement, if any, is reached pursuant to the Board's bargaining order, the employer would be at liberty to disregard the terms of the contract. The temptation to violate the Act in a situation where the employer would have everything to gain and nothing to lose would be overwhelming.

The principle underlying these decisions has been affirmed by the Supreme Court in *N.L.R.B. v. Joseph T. Strong, d/b/a Strong Roofing & Insulating Co.*, 393 U.S. 357.

³⁶ 160 NLRB 1318, *enfd.* 380 F.2d 1005 (C.A. 8).

ployees a better position than the union's bargaining might have achieved, the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act. Retroactive enforcement must always contain in it some element of hardship on the employer, but a failure to grant back pay imposes at least an equal hardship on the employees.

And in *Fibreboard Paper Products Corp.*,²⁷ the employer unilaterally contracted out its maintenance operations in violation of Section 8(a)(5). The Board concluded that an order to bargain about this decision could not, by itself, adequately remedy the effects of the violation. It further ordered the employer to reinstate the employees and to make them whole for any loss of earnings suffered on account of the unlawful conduct. The Supreme Court upheld the compensatory remedy, and stated that "There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act."²⁸

The question now before us is whether a reimbursement order is an appropriate remedy for other types of unlawful refusals to bargain. On the basis of the foregoing analysis regarding Section 10(c), we believe that the Board has the power to order this type of relief. Further, for the reasons set forth herein, we are of the view that the compensatory remedy is appropriate and necessary in this case to effectuate the policies of the Act.

An employer's unlawful refusal to bargain completely frustrates the purposes of the Act, as it directly contravenes the congressional policy of encouraging collective bargaining and also denies the statutory right of the employees to bargain collectively through their chosen repre-

²⁷ 138 NLRB 550, *enfd.* 322 F.2d 411 (C.A.D.C.), *affd.* 379 U.S. 203.

²⁸ 379 U.S. at 216. See also *N.L.R.B. v. Joseph T. Strong, d/b/a Strong Roofing & Insulating Co.*, *supra* at fn. 35.

sentative.³⁹ It is clear from the Act itself and from its legislative history that immediate recognition of this right was contemplated; and partly to achieve this goal Congress, in originally enacting the Act in 1935, excluded Board orders in certification proceedings under Section 9(c) from direct review in the courts.⁴⁰ This judgment was reaffirmed in 1947 when a conference committee rejected a proposed House amendment which would have permitted any interested persons to obtain review immediately after certification because "such provision would permit dilatory tactics in representation proceedings."⁴¹ Very often, as noted by

³⁹ Both the legislative history of the Act and decisions of the Supreme Court emphasize the central role of the employees' right to bargain and the correlative duty of employers to honor it. S. Rep. No. 573, 74th Cong. 1st Sess. 12 (1935). See, e.g., *Consolidated Edison Co. of New York, Inc. v. N.L.R.B.*, 305 U.S. 197, 236: "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective-bargaining."; *N.L.R.B. v. Insurance Agents' International Union, AFL-CIO [Prudential Ins. Co.]*, 361 U.S. 477, 483: "It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement."

⁴⁰ A Board decision in a certification proceeding is not a "final order" made reviewable by Section 10(e) and (f) in the courts of appeals. See, e.g., *American Federation of Labor, et al. [Shipowners' Assn. of the Pacific Coast] v. N.L.R.B.*, 308 U.S. 401; *Boire v. The Greyhound Corporation*, 376 U.S. 473. The House Report clearly states the policy behind this restriction:

When an employee organization has built up its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining, and the employer refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representatives, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. H.R. Rep. No. 972, 74th Cong., 19 Sess. 5-6.

⁴¹ Statement by Senator Taft, 93 Cong. Rec. 6444 (1947), as cited in *Boire v. The Greyhound Corporation*, fn. 40, *supra* at 479.

the Supreme Court, the procedural delays necessary to make a fair determination on charges of unfair labor practices have the effect of postponing indefinitely the performance of employers' statutory duty to bargain, thus depriving employees of their legal right to such collective-bargaining representation.⁴³ The Board has taken various steps in an effort to relieve the wrongful effects of such delay. Thus, in *Franks Bros. Company*,⁴⁴ for example, the Board issued a bargaining order even though the union had lost its majority before the issuance of the complaint alleging the refusal to bargain, and the Supreme Court upheld this action, commenting that to order further elections would be "providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it had adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement."⁴⁴

The present remedies for unlawful refusals to bargain

⁴³ *International Association of Machinists, Tool and Die Makers Lodge No. 35 [Serrick Corp.] v. N.L.R.B.*, 311 U.S. 72, 82; *Franks Bros. Company v. N.L.R.B.*, 321 U.S. 702, 704, where the Court observed that:

Out of its wide experience, the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.

⁴⁴ 44 NLRB 898, *enfd.* 137 F.2d 989 (C.A. 1), *affd.* 321 U.S. 702.

⁴⁴ *Supra* at 705. See also the Board's policy of computing backpay on a quarterly basis discussed *supra*. Further, in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, the Board held that the filing of a refusal-to-bargain charge was not foreclosed by the fact that the union lost a representation election, since an employer's unlawful activities could very well have caused the loss. To do otherwise would lend "the Board procedures as a tool to thwart the statutory rights of the majority of the employees involved and subverts the very purpose of the Act." 146 NLRB at 1281.

often fall short, as in the present case, of adequately protecting the employees' right to bargain. Recent court decisions, congressional investigations, and scholarly studies have concluded that, in the present remedial framework, justice delayed is often justice denied.⁴⁵

In *N.L.R.B. v. Tidee Products, Inc.*, the Court of Appeals for the District of Columbia Circuit recently stated that:⁴⁶

While [the Board's usual bargaining] remedy may provide some bargaining from the date of the order's enforcement, it operates in a real sense so as to be counter-productive, and actually to reward an employer's refusal to bargain during the critical period following a union's organization of his plant. The obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace, *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).

. . . Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the com-

⁴⁵ The Cox Advisory Panel's report to the Senate Committee on Labor and Public Welfare concluded that a major weakness in labor-management relations law is the long delay between the point at which a union seeks recognition of its majority status and the day when the employees' right to bargain through their chosen representative is vindicated by enforcement of a bargaining order. The Panel posed the question: "If an employer refused to bargain collectively on June 3, 1959, how much good will be done by an order to bargain entered December 1, 1961?" It concluded that "A remedy granted more than 2 years after the event will bear little relation to the human situation which gave rise to the need for Governmental intervention." Pages 2 and 10 of report pursuant to S. Res. 66 and S. Res. 141, 86th Cong., 2d Sess. 81 (1960). A similar conclusion is evident from the testimony given in the hearings before the Special Subcommittee on Labor of the House Committee on Education and Labor on H.R. 11725 (1967) which investigated the adequacy of Board remedies.

⁴⁶ *Supra* at p.

pany is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. See Ross, *Analysis of Administrative Process Under Taft-Hartley*, 1966 Labor Relations Yearbook 299, 302-303; Note, *An Assessment of the Proposed 'Make-Whole' Remedy in Refusal-To-Bargain Cases*, 67 Mich. L. Rev. 374, 378 (1968). Thus the employer may reap a second benefit from his original refusal to comply with the law: He may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.

A study by Professor Philip Ross shows that a contract is signed in most situations where the employer honors its duty to bargain without delay,⁴⁷ but that the chance of a contract being signed is cut in half if the case must go to court enforcement of a bargaining order.⁴⁸ In the interim,

⁴⁷ An independent study of UAW experience in obtaining first bargaining contracts during a 6-month period was made by Professor Ross, and its results were appended to the UAW's brief. The study indicates that the UAW succeeded in obtaining contracts in 97 percent of the cases following a Board-conducted election. The contracts resulted in average percentage wage increases of 7.9 percent and an average increase in the value of fringe benefits amounting to 3.9 percent.

⁴⁸ A study made of 1960 cases in five Board Regional Offices revealed that unions succeeded in gaining contracts in 84 to 90 percent of the cases following their winning Board-conducted elections. Ross, *The Government as a Source of Union Power* 251 (1965). Professor Ross' more recent study, *The Labor Law in Action: An Analysis of the Administrative Process Under the Taft-Hartley Act* (1966), considered all 8(a)(5) cases during a 5-year period. Cases concerning first bargaining situations yielded the following conclusions:

By far, the most significant influence on bargaining consequences was the stage of case disposition. The facts speak for themselves. About two-thirds of cases closed before issuance of complaints resulted in execution of first contracts. . . .

With the exception of a handful of cases which required Supreme Court action prior to closing, the longer the litigation the less likely was the prospect of the signing of a first contract. Only

of course, the employees are deprived of their rightful union representation and the opportunity to bargain over their terms and conditions of employment, while at the same time their employers may gain a monetary advantage over their competitors who have complied with their legal duty.

The present case is but another example of a situation where a bargaining order by itself is not really adequate to remedy the effects of an unlawful refusal to bargain. The Union herein requested recognition on August 3, 1964, and proved that it represented a majority of employees 2½ months later in a Board-conducted election. Nonetheless, since October 1965 the employer, by unlawfully refusing to bargain with the Union, has deprived its employees of their legal right to collective bargaining⁴⁹ through their certified bargaining representative.⁵⁰ While a bar-

about half (approximately 57 percent) of all cases closed after a Board order resulted in such contracts and less than 36 percent of the cases closed after circuit court enforcement ended up with agreements.

The explanation for these results which comes most readily to mind is the factor of time. The long, drawn out process of administrative investigation, hearing and findings and, ultimately adjudication, bring two, three or four years of delay and a weakening of the charging union through the effects of the unexpunged unfair labor practices upon the employees. . . .

Professor Ross' earlier study revealed that on the average nearly 2½ years elapse between the filing of an unfair labor practice charge and the issuance of a judicial decree. Ross, *The Government as a Source of Union Power*, at 171.

⁴⁹ Cf. *N.L.R.B. v. Southbridge Sheet Metal Works, Inc.*, 380 F.2d 851 (C.A. 1). Such delay frustrates the purposes of the Act and leads to strikes and other labor unrest.

⁵⁰ We find no merit in the Respondent's contention in the present case that, at least in a "technical" refusal-to-bargain situation, a compensatory remedy would penalize it for obtaining judicial review of the Board's representation proceedings. In *Consolo v. Federal Maritime Commission*, *supra* at 624-625, the Court rejected the same contention.

gaining order at this time, operating prospectively, may insure the exercise of that right in the future, it clearly does not repair the injury to the employees here, caused by the Respondent's denial of their rights during the past 5 years.

In these refusal-to-bargain cases there is at least a legal injury. Potential employee losses incurred by an employer's refusal to bargain in violation of the Act are not limited to financial matters such as wages. Thus, it is often the case

Relying on a case involving the Board (*N.L.R.B. v. Electric Vacuum Cleaner Company, Inc.*, 315 U.S. 685), the Court concluded that "At any rate it has never been the law that a litigant is absolved from liability for that time during which his litigation is pending" (*Id.* at 624-625) and noted (at 625) that the time of appeal allowed the respondent to continue its unlawful conduct thus in turn continue to injure the petitioner. That such a remedy would include the entire amount lost by the wronged party, instead of being reduced by the amount accruing while the violator was contesting the issue, no more makes the remedy penal in character under this Act than it does elsewhere. "The litigant must pay for his experience, like others who have tried and lost." *Life & Casualty Ins. Co. v. McCray*, 291 U.S. 566, 575.

There is no question of the right of an employer to test the legal propriety of a Board certification or to test its legal position respecting any issue of law or fact upon which a Board bargaining order is predicted; but it should not thereby realize benefits not usually flowing from such a proceeding. In other words, should an employer choose to await court action, and if its legal position be sustained, it would not only be absolved of the duty to bargain, but also of any monetary remedy arising out of the order contemplated herein; if, on the other hand, an employer be found to have rested its refusal to bargain on an erroneous view of law or fact, any loss to employees incurred by its continued adherence to that error should be borne by that employer and not by its employees. That is the risk taken by all litigants.

The employer's argument for tolling the compensatory period during the time he contests the violation is contrary to the policy of the Act in fostering the prompt commencement of collective bargaining, a policy shown explicitly in the denial of judicial review of the Board's representation proceedings. To allow the employer to avoid making his employees whole for the period bargaining was delayed by his litigating a mistaken view of the law would encourage such delay in the areas in which Congress particularly deemed speed to be essential.

that the most important employee gains arrived at through collective bargaining involve such benefits as seniority, improved physical facilities, a better grievance procedure, or a right to arbitration. Therefore, even the remedy we would direct herein is not complete, limited as it is to only some of the monetary losses which may be measured or estimated. The employees would not be made whole for all the losses incurred through the employer's unfair labor practice. But, where the legal injury is accompanied by financial loss, the employees should be compensated for it. The compensatory period would normally run from the date of the employer's unlawful refusal to bargain until it commences to negotiate in good faith, or upon the failure of the Union to commence negotiations within 5 days of the receipt of the Respondent's notice of its desire to bargain with the Union,⁵¹ although here a later starting date could be used because this remedy would be a substantial departure from past practices.⁵² Further, the Board could follow its usual procedure of providing a general reimbursement order with the amount, if any, to be determined as part of the compliance procedure.⁵³

⁵¹ It is argued that the remedy contemplated should not be computed from the beginning of the Employer's refusal to bargain since collective-bargaining contracts are usually not agreed upon immediately upon the inception of a duty to bargain. However, an order that liability shall cease when the Respondent *commences* to bargain, not when an agreement is achieved, negates any such argument for a delayed date of liability. For, the period between commencement of bargaining and agreement would be provided for at the end of the liability period rather than at the beginning. In addition to providing beginning and ending dates more precise and less conjectural, a computation on such a basis has the added advantage of permitting the employer to accept its basic responsibility to bargain and thereby toll the accrual of reimbursable losses and leave it free actually to bargain without added pressure to reach a contract in order thereby to minimize its monetary liability, thus fostering collective bargaining without compelling agreement.

⁵² Cf. *Fibreboard Paper Products Corp. v. N.L.R.B.*, *supra* at fn. 22.

⁵³ As Mr. Justice Frankfurter said, concurring in *N.L.R.B. v. Deena*

This type of compensatory remedy is in no way forbidden by Section 8(d).⁵⁴ It would be designed to compensate employees for injuries incurred by them by virtue of the unfair labor practices and would not require the employer to accept the measure of compensation as a term of any contract which might result from subsequent collective bargaining. The remedy contemplated in no way "writes a contract" between the employer and the union, for it would not specify new or continuing terms of employment and would not prohibit changes in existing terms and conditions.⁵⁵ All of these would be left to the outcome of bar-

Artware, Inc., 361 U.S. 398, which also involved a compensatory remedy:

The Board's procedure in unfair labor practice cases is first to hold a hearing to determine whether an unfair labor practice was committed, and, if it was, whether it would "effectuate the policies of the Act" for the Board to order reinstatement with backpay of any employees who were discharged. Section 10(c). In such a proceeding, the Board does not concern itself with the amount of backpay actually owing. This is excluded from the proceeding in the interest of the efficient administration of the Act. . . . [The Board's] primary function under Section 10, in connection with which it makes specific monetary orders for specific employees, is to prevent the conduct defined as unfair labor practices in Section 8. Section 10(c) provides that once the Board determines that an unfair labor practice occurred, it may make such remedial orders for reinstatement with backpay as will "effectuate the policies" of the Act. We have held that the Board is granted broad discretion over the fashioning of remedial orders by this provision. . . . The salient fact which brings the Board's remedial power into play under Section 10(c) is its finding that the employer's conduct constituted an unfair labor practice. . . . [361 U.S. at 411-412].

⁵⁴ The provision in Section 8(d) that neither party is required to agree to a proposal or make a concession appears to have been designed, not for the situation before us, but to preclude the Board from evaluating "the merits of the provisions of the parties" as a factor in determining whether bargaining was in good faith. House Conference Report, Legislative History, p. 538.

⁵⁵ It is in this respect that this situation is distinguishable from the one that was before the Supreme Court in *H. K. Porter Co., Inc. v.*

gaining, the commencement of which would terminate Respondent's liability.

Furthermore, this compensatory remedy is not a punitive measure. It would be designed to do no more than reimburse the employees for the loss occasioned by the deprivation of their right to be represented by their collective-bargaining agent during the period of the violation. The amount to be awarded would be only that which would reasonably reflect and be measured by the loss caused by the unlawful denial of the opportunity for collective bargaining. Thus, employees would be compensated for the injury suffered as a result of their employer's unlawful refusal to bargain, and the employer would thereby be prohibited from enjoying the fruits of its forbidden conduct to the end, as embodied in the Act, that collective bargaining be encouraged and the rights of injured employees be protected.⁵⁶ It is well settled that a reimbursement order is not a redress for a private wrong, since the Act does not create a private cause of action for damages,⁵⁷ but is a remedy created by statute and designed to aid in

N.L.R.B., 397 U.S. 99, which involved a dispute over a contract clause. See *I.U.E. [Tiidee Products, Inc.] v. N.L.R.B.*, *supra*.

⁵⁶ *Local 57, International Ladies' Garment Workers' Union, AFL-CIO v. N.L.R.B.*, [*Garwin Corp.*], 374 F.2d 295 (C.A.D.C.), cert denied 387 U.S. 942, where the court of appeals, in refusing to enforce part of a Board order on the ground that it constituted a penalty, said that:

The Board is indeed correct when it states that the purpose of a remedy must be restoration of the *status quo* to the greatest extent practicable; however, the basic purpose of restoring the *status quo* is to redress the injury done to employees. . . . The crucial element in all these cases is that the interest being protected is the freedom of choice of the workers in a bargaining unit. . . . [T]he purpose of Board remedies is to rectify the harm done to the injured workers, not to provide punitive measures against errant employers. [374 F.2d at 300-303]

⁵⁷ See, e.g., H.R. Rep. No. 1147 on S. 1958 24 (1935); *Virginia Electric and Power Company v. N.L.R.B.*, fn. 22, *supra* at 744; *International Brotherhood of Operative Potters v. N.L.R.B.*, fn. 21, *supra* at 761.

the achievement of the public policy embodied in the Act.⁵⁸ Accordingly, as the reimbursement order sought herein is meant to enforce public policy, the Board's exercise of its discretion in ordering such a remedy would not be strictly confined to the same considerations which govern comparable awards in either equity courts⁵⁹ or damage awards in legal actions.⁶⁰ In the first place, it is well established that, where the defendant's wrongful act prevents exact determination of the amount of damage, he cannot plead such uncertainty in order to deny relief to the injured person,

⁵⁸ In upholding the Board's *Woolworth* formula, the Supreme Court stated that:

It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is "remedial" and what is "punitive." It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act. [*N.L.R.B. v. Seven-Up Bottling Company*, fn. 31, *supra* at 348.]

⁵⁹ "For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law of chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide. . . . The fact that the Board may only have approximated its efforts to make the employees whole . . . does not convert this reimbursement into the imposition of a penalty." *Virginia Electric and Power Company v. N.L.R.B.*, fn. 22, *supra* at 543-554; see also *Phelps Dodge Corp. v. N.L.R.B.*, fn. *supra* at 188; *F. W. Woolworth Company v. N.L.R.B.*, 121 F.2d 658 (C.A. 2).

⁶⁰ See, e.g., *N.L.R.B. v. Deena Artware Inc.*, fn. 53, *supra* at 413, where Mr. Justice Frankfurter, concurring, said that:

The Board's determinations are not merely administrative analogues of common-law judgments and they do not purport to be. As here, they uniformly contain a specific direction to take "affirmative action." In enforcing the Board's orders the Courts of Appeals similarly act not merely to review a common-law judgment, but to "effectuate the policies" of the National Labor Relations Act. . . .

but rather must bear the risk of the uncertainty which was created by his own wrong.⁶¹ The Board is often faced with the task of determining the precise amount of a make-whole order where the criteria are less than ideal, and has successfully resolved the questions presented.⁶²

⁶¹ *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563. When reaffirming this principle in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265, the Supreme Court relied on *F. W. Woolworth Company v. N.L.R.B.*, 121 F.2d 658 (C.A. 2). The court of appeals in that case enforced the Board's backpay order even though, because of the employer's conduct, it could not be determined which employees were discriminatorily discharged, and stated that:

In this striving to restore the *status quo*, the Board was forced to use hypothesis and assumption instead of proven fact. But its order is not invalid on that account; for Petitioner, by its unlawful conduct, has made it impossible to do more than to approximate the conditions which would have prevailed in the absence of discrimination. . . . Even in private litigation, the courts will not impose an unattainable standard of accuracy. Certainty in the fact of damages is essential. Certainty as to the amount goes no further than to require a basis for a reasonable conclusion.

The same principle has been applied to a backpay award granted to remedy a violation of Section 8(a)(5) in *Leeds & Northrup Co. v. N.L.R.B.*, *supra* (see statement quoted at pp. 27-28 above).

⁶² The problem most frequently arises when we must determine the amount of backpay due to unlawfully discharged employees. As we recently stated in connection with this issue (*The Buncher Company*, 164 NLRB 340, *enfd.* 405 F.2d 787 (C.A. 3)):

In solving many of the problems which arise in backpay cases, the Board occasionally is required to adopt formulas which result in backpay determinations that are close approximations because no better basis exists for determining the exact amount due. However, the fact that the exact amount due is incalculable is no justification for permitting the Respondent to escape completely his legal obligation to compensate the victims of his discriminatory actions for the loss of earnings which they suffered. In general, courts have acknowledged that in solving such backpay problems, the Board is vested with wide discretion in devising procedures and methods which will effectuate the purpose of the Act and has generally limited its review to whether a method selected was "arbitrary or unreasonable in the circumstances involved," or whether in determining the amount, a "rational basis" was utilized.

But even if a reimbursement order were judged by legal or equitable principles regarding damages, the remedy would not be speculative. It is well established that the rule which precludes recovery of "uncertain damages" refers to uncertainty as to the fact of injury, rather than to the amount.⁶³ Where, as here, the employer has deprived its employees of a statutory right, there is by definition a legal injury suffered by them, and any uncertainty concerns only the amount of the accompanying reimbursable financial loss.

From a remedial viewpoint, the present type of refusal to bargain differs from other 8(a)(5) situations where reimbursement has been ordered only in the method of proof needed to calculate the amount of financial loss, if any, which the employees may have suffered. In the cases involving employer refusals to sign agreements already reached, the employees' losses were compensated according to the terms of such agreement for the length of the delay in its effectuation caused by the employer.⁶⁴ Where the employer unilaterally discontinued a Christmas bonus, the amount of employee loss was determined by utilizing the past records of bonuses given and the methods by which they were previously calculated.⁶⁵ In a recent case,⁶⁶ a union and a multiemployer bargaining association success-

⁶³ *Story Parchment Co. v. Paterson Parchment Co.*, *supra*.

⁶⁴ E.g., cases cited in fn. 35, *supra*.

⁶⁵ *Leeds & Northrup Co. v. N.L.R.B.*, *supra*; *American Fire Apparatus Co.*, fn. 36, *supra*. The court of appeals, in enforcing the order in the latter case, stated that:

... the only question is whether the Board can fairly arrive at the loss, and such determination on the part of the Board may not judicially be required to rest upon any greater degree of certainty as to amount than that applicable to the contract or statutory breaches generally. [380 F.2d at 1006.]

⁶⁶ *N.L.R.B. v. Joseph T. Strong, d/b/a Strong Roofing & Insulating Co.*, *supra*.

fully bargained to a contract. The employer subsequently refused to sign the contract and attempted to withdraw from the multiemployer bargaining association. The Board found a violation of Section 8(a)(5) and ordered the employer to cease and desist from unfair labor practices, to sign the contract, and to pay the fringe benefits provided for in that contract. The court of appeals had agreed with the Board's finding of a violation and its order to cease and desist from violation and to sign the contract, but refused to enforce that part of the Board's order requiring the Respondent to pay the contractual fringe benefits as being outside the Board's powers. The Supreme Court, on writ of *certiorari*, affirmed the Board order *in toto*, finding that the provision ordering the Respondent to pay the contractual fringe benefits was within the Board's remedial power granted in Section 10(c) of the Act. In situations of unlawful unilateral discontinuance of part of an operation,⁶⁷ the compensation is based upon the wage rates previously earned by the injured employees. It may be noted that the Supreme Court upheld the order in *Fibreboard* even though the amount of actual loss might be deemed speculative because it was not shown that had the employer bargained lawfully it would not have contracted out the work and discharged the employees.

As previously indicated, the injury suffered by employees is predicated upon the employees' being deprived of the right to collective bargaining as required by the Act. The burden of proof would be upon the General Counsel at the compliance stage to translate that legal injury into terms of measurable financial loss, if any, which the employees might reasonably be found to have suffered as a consequence of that injury.

A showing at the compliance stage by the General Counsel or Charging Party by acceptable and demonstrable means that the employees could have reasonably expected

⁶⁷ *Fibreboard Paper Products Corp. v. N.L.R.B.*, *supra*.

to gain a certain amount of compensation by bargaining would establish a *prima facie* loss, and the Respondent would then be afforded an opportunity to rebut such a showing. This might be accomplished, for example, by adducing evidence to show that a contract would probably not have been reached, or that there would have been less or no increase in compensation as a result of any contract which might have been signed.

Accordingly, uncertainty as to the amount of loss does not preclude a make-whole order proposed here, and some reasonable method or basis of computation can be worked out as part of the compliance procedure. These cannot be defined in advance, but there are many methods for determining the measurable financial gain which the employees might reasonably have expected to achieve, had the Respondent fulfilled its statutory obligation to bargain collectively. The criteria which prove valid in each case must be determined by what is pertinent to the facts. Nevertheless, the following methods for measuring such loss do appear to be available, although these are neither exhaustive nor exclusive. Thus, if the particular employer and union involved have contracts covering other plants of the employer, possibly in the same or a relevant area, the terms of such agreements may serve to show what the employees could probably have obtained by bargaining.⁶⁸ The parties could also make comparisons with compensation patterns achieved through collective bargaining by other employees in the same geographic area and industry.⁶⁹ Or the parties might employ the national average

⁶⁸ As an example, the Union here presented evidence of the collective-bargaining agreements it had negotiated with Ex-Cell-O at five of its other plants in nearby States.

⁶⁹ Data customarily cited by companies and unions in negotiations, according to the study by the National Industrial Conference Board, "Preparing for Collective Bargaining," pp. 60 and 65, tables 2 and 6, could also assist in making the determination. The company lists in-

percentage changes in straight time hourly wages computed by the Bureau of Labor Statistics.

And there is other available significant data which may be utilized to indicate the value of the lost collective-bargaining opportunity. For example, the Bureau of Labor Statistics conducts an annual study of union wage scales in the building construction, local transit, local trucking, and printing industries. This study covers all local unions in 68 selected cities. BLS similarly makes a quarterly wage survey of seven major construction trades in 100 selected cities. The Bureau also issues monthly reports of wage and benefit changes under collective-bargaining agreements in manufacturing establishments employing 1,000 or more production and related workers. A related survey of wage developments in smaller manufacturing units covers both unionized and nonunionized establishments. There are other Bureau of Labor Statistics facts which may bear on the remedy. One of significance is the periodic wage and benefits survey of 50 manufacturing and 20 nonmanufacturing industries. The data collected in this program reports on about 20 million employees on both a national and regional basis, usually with listings by size of establishment, size of community, collective-bargaining coverage, and type of product or plant group. Another Bureau of Labor Statistics program periodically gathers wage and benefits data on a Standard Metropolitan Statistical Area basis for more than 60 occupational categories in all but

clude settlements negotiated by other firms in company's industry; settlements negotiated by union with which company deals; settlements in company's immediate job area; settlements negotiated by big companies; settlements negotiated by subsidiaries of parent company; settlements negotiated by related industries, such as suppliers; settlements negotiated with other unions, etc. The union lists include settlements by other companies within the jurisdiction of the union; settlements in the immediate job market area of the firm with which the union is dealing; settlements negotiated by the big companies; and miscellaneous.

the smallest establishments. Depending on the type of industry, these surveys cover from 8 to 72 metropolitan areas.⁷⁰ Guidance may also be forthcoming, on occasion, from other forms of data frequently cited in the collective-bargaining process⁷¹ such as Consumer Price Indices and productivity statistics. Other relevant wages and benefit information will be available to the General Counsel and the parties from private sources and their use and usefulness in the compliance process will likely vary with the particular circumstances of the individual case. Furthermore, additional data could become available through new compilations which might later be undertaken by the Bureau of Labor Statistics or other agencies, including this agency, as well as by unions, employers, and private and public organizations and institutions.

In the instant case, as noted above, a *prima facie* showing of loss can readily be made out by measuring the wage and benefit increments that were negotiated for employees at Respondent's other organized plants against those given employees in this bargaining unit during the period of Respondent's unlawful refusal to bargain. Granted that the task of determining loss may be more difficult in other cases where no similar basis for comparison exists, this is not reason enough for the Board to shirk its statutory re-

⁷⁰ All of the foregoing programs of fact gathering and analysis are described in detail in Bureau of Labor Statistics, *Handbook of Methods for Surveys and Studies* (1966).

⁷¹ Measuring the amount of loss calls for a knowledge of pay rates in the industry and area for comparable jobs, a detailed understanding of the pay rates in Respondent's plant and increases therein during the period when compensation may have been accruing, and like specialized technical matters.

Employers and unions are well equipped by their specialized knowledge and experience to deal with these matters. Indeed, from time to time, they have been able to resolve the amounts due in large, complex backpay cases following Board orders remedying unfair labor practice discharges, etc., by negotiation for the approval of the Regional Directors.

sponsibilities,⁷² and no reason at all for it to do so in a case such as this where that difficulty is not present.

For the reasons set out above, we would order the Employer to make its employees whole for their measurable losses, if any, resulting from the unlawful refusal to bargain. We dissent from the Decision of the Board to the extent that it fails to direct such a remedy.

Dated, Washington, D.C., Aug. 25, 1970.

Frank W. McCulloch, Member
Gerald A. Brown, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

⁷² As the Board was reminded by the court in the *Tüdee Products* case.

A tribunal given the function of implementing national policy through compensatory remedies may not soundly refer to the difficulty in qualifying appropriate compensation as a justification for the withdrawal and frustration of the policy. . . .

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL, upon request, recognize and bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of all our employees in the appropriate bargaining unit. The bargaining unit is:

All production and maintenance employees, including tool crib store employees, shipping and receiving and follow-up employees, but excluding all office clerical and plant clerical employees, all professional employees, guards, and supervisors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL bargain collectively, on request, with the above-named Union as the exclusive representative of the employees in the unit described above with respect to rates of pay, wages, hours of employment, and other conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

EX-CELL-O CORPORATION
(Employer)

Dated_____ By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days

from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 614 ISTA Center, 150 West Market Street, Indianapolis, Indiana 46204, Telephone 317-633-8921.



BRIEF FOR PETITIONER

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24704

RETAIL CLERKS UNION, LOCAL 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*
ZINKE'S FOODS, INC., *Intervenor.*

On Petition to Review an Order
of the National Labor Relations Board

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24704

RETAIL CLERKS UNION, LOCAL 1401,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*
ZINKE'S FOODS, INC., *Intervenor.*

On Petition to Review an Order
of the National Labor Relations Board

BRIEF FOR PETITIONER

STATEMENT OF ISSUE PRESENTED

Whether Respondent National Labor Relations Board has abdicated its statutory responsibility by failing to make any effort to devise a compensatory remedy for Intervenor Company's flagrant denial of its employees' right to organize and bargain collectively.

This case has not previously been before this Court.

This Court has jurisdiction of this Petition to Review pursuant to Section 10(f) of the National Labor Relations Act, as amended (49 Stat. 449 (1935); as amended, 61 Stat. 136 (1947), 73 Stat. 519 (1959); 29 U.S.C. § 151 *et seq.*)¹

REFERENCES TO RULINGS

The Trial Examiner's Decision issued on December 14, 1966, is reproduced in full in the Joint Appendix at page 157.²

The Decision and Order of the National Labor Relations Board, 185 NLRB No. 109, issued on October 7, 1970, is reproduced in full in the Joint Appendix at page 203.

STATEMENT OF THE CASE

Petitioner Retail Clerks Union, Local 1401, RCLIA (hereafter referred to as the "Union" or "Petitioner") seeks review of the failure of the National Labor Relations Board (hereafter the "Board" or "NLRB") to provide a meaningful, effective remedy for the deliberate, flagrant, and totally indefensible refusal to bargain committed by Intervenor Zinke's Foods, Inc. (hereafter the "Company" or "Zinke's"). Briefly, the Board found that the employees' February 1966 organizing activity was overwhelmed by the Company's unfair labor practices. The Board found that the Company not only refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act (J.A. 205-206, 173-179), but also used a wide array of coercive, discriminatory, and other intimidating tactics to thwart the employees' effort to secure

¹ Hereafter referred to as the "Act."

² The Joint Appendix will hereafter be referred to as "J.A." References preceding a semicolon are to Board and Trial Examiner Decisions; those following are to the record pleadings, testimony or exhibits.

Union representation in collective bargaining (J.A. 205, 163-173, 179-180). As remedy for this clear and flagrant denial of the employees' right to organize and bargain collectively, the Board, in 1970, merely ordered the Company to "cease and desist" its unlawful conduct, to bargain prospectively with the Union, and to post a Notice of its violations to the employees (J.A. 206, 191-196).³ The Union submits that this belated, mild rebuke—in total disregard of the economic realities of this refusal to bargain—constitutes an abject denial of the Board's remedial powers. Some type of "make-whole" relief is necessary to dissipate the economic consequences—harm to employees and gain to employer—flowing directly from the Company's refusal to bargain. The facts of this case highlight the pressing need to provide a remedy that will encourage, rather than frustrate, the overriding statutory policy of promoting collective bargaining.⁴

³ The Board also provided an affirmative remedy for the unlawful discrimination against employee Edward Kallas (J.A. 181-182, 192-193). Although not conceding the adequacy of the Company's alleged offer of "reinstatement" and \$41.28 in "backpay" (J.A. 168; 101-103), Petitioner does not seek review of this aspect of the Board order. These matters can be resolved in compliance proceedings.

⁴ The Board considered the present case (*Zinke's Foods, Inc.*, Cases 30-CA-372, 30-RC-400) along with three other cases presenting the need for a "make-whole" remedy for Section 8(a)(5) refusals to bargain. *Ex-Cell-O Corp.*, Case 25-CA-2377; *Herman Wilson Lumber Co.*, Case 26-CA-2536; and *Rasco Olympia, Inc.*, Case 19-CA-3187. The Board heard oral argument in all four cases on July 12 and 13, 1967. The Board chose *Ex-Cell-O*, 185 NLRB No. 20, to announce its reasons for denying relief in all cases. See *Zinke's* (J.A. 206); *Herman Wilson Lumber Co.*, 185 NLRB No. 125, pp. 3-4; *Rasco Olympia, Inc.*, 185 NLRB No. 110, p. 3. See also *Sayers Printing Co.*, 185 NLRB No. 120, p. 2, n. 3. Since the *Ex-Cell-O* reasoning was held to be "equally applicable" to *Zinke's* facts (J.A. 206), that decision has been included in the Joint Appendix (J.A. 230-270) to facilitate the Court's review of the Board's disposition of the present case.

The Board's Decision in *Ex-Cell-O* is pending review by this Court. *U.A.W. v. N.L.R.B.*, Nos. 24,577 and 24,715.

The discussion which follows sets forth the history of the Company's unfair labor practices (as found by the Trial Examiner and Board), the nature of the Trial Examiner's recommendation for a Section 8(a)(5) "make-whole" remedy, and the Board's reasons for denial of that recommendation.

I. The Company Coercively Retaliates Against the Employees' Organizing Efforts.

A. The Employees Freely Select the Union to Represent Them in Collective Bargaining.

The origin of this proceeding is a simple, honest, attempt on the part of employees at the Company's Beloit, Wisconsin, retail grocery store to exercise their right to organize and bargain collectively.⁵ The organizing activity began in early February 1966 (J.A. 170; 83-84). The Union's Secretary-Treasurer and Business Representative, William A. Moreth, met with employees Edward Kallas and Doris Saladino on February 8 or 9, 1966 (J.A. 170; 83-84). Moreth "... explained the benefits of a union and explained the Kohl's contract to us [the two employees] as an example ..." of those benefits (J.A. 84).⁶ Moreth also stated that the law protected the employees' right to organize, and he outlined the procedure for attaining Union representation (*ibid.*). Thereafter, employee Kallas became the active

⁵ "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 of the Act.

⁶ The Union represents the employees of Kohl's and about six other food store employers in the Beloit-Janesville area (J.A. 119-123, 134). These employers are bound by the same area-wide collective bargaining agreement (J.A. 116, 119-122, 156). Janesville is about ten miles north of Beloit (J.A. 115). Moreth also administers Union contracts in the Madison, Wisconsin, area, some 50 miles north of Beloit (J.A. 115, 122).

"employee organizer" in the store (J.A. 170; 85-87). He distributed Union authorization cards at an employee meeting on February 11 (J.A. 85). By February 14, 17 employees out of a bargaining unit⁷ of 26 had signed authorization cards (J.A. 205, 159, 173-174; 56-57, 60-62, 110-111, 149-153).

B. The Company Responds to the Union's Request for Recognition with Coercive, Anti-Union Conduct.

On February 14, 1966, the Union sent the Company a letter indicating the Union's majority support among the employees, offering to prove that majority through a check of authorization cards by "a neutral party of [the Company's] own choosing," and requesting the Company to recognize the Union as the employees' bargaining agent and to begin negotiations for a collective bargaining agreement (J.A. 159; 140).⁸ The Company's written response to the Union (dated February 16, 1966) stated that the Company refused recognition and bargaining because of a "question" on the appropriateness of the requested bargaining unit⁹ and the reliability of authorization cards

⁷ The parties agreed that the following unit was appropriate for collective bargaining (J.A. 160, 174; 33-34, 36, 40, 55):

"All regular full-time and regular part-time employees of the [Company] at its Beloit, Wisconsin, store; excluding meat department employees, store manager, office clerical employees, guards and supervisors as defined in the Act."

⁸ The Union letter suggested that negotiations start on February 21, 1966 (J.A. 140). Through its unlawful conduct and its pretense of defending that conduct before the Board, the Company has thus far postponed the commencement of bargaining for five years. And, its armory of "legal" delaying tactics is far from exhausted.

⁹ At the hearing, Company counsel revealed that the Company's only "question" as to the Union's initial unit description was that it excluded janitors (J.A. 55-56), whereas the unit later found appropriate included the janitors (J.A. 160; 33-34). The janitors' inclusion or exclusion clearly had no bearing on the Union's representative status (J.A. 174, n. 19; 60, 56-57).

(J.A. 160; 154).¹⁰ On February 21, the Union petitioned the NLRB for a representation election (J.A. 160; 4).

The Company's response to the employees took the form of coercive interrogation, threats, promises of benefits, and other conduct designed to defeat the employees' organizational effort. The anti-Union campaign began a few days after the Union's recognitional request and continued with increasing intensity until shortly before the March 16 NLRB election (J.A. 178).

On February 19, Zinke's store manager, Tom Kozel, interrogated employee organizer Kallas concerning his Union activity, indicated he (Kozel) thought that was "a dirty rotten trick," and warned that the store would close if the "union comes in" (J.A. 163-164; 87-89). On February 23, Manager Kozel angrily denounced Kallas for his part in the organizing activity (J.A. 164; 89-91, 135-137). About March 11, Kozel prohibited Kallas from talking to employees about the Union at any time and in any part of the store (J.A. 164; 95). Also in March, Kozel began to increase his constant harassment of Kallas, which eventually led to Kallas' forced departure (J.A. 171-172; 96-98, 106-107).

In addition, about two weeks before the March 16 election, Manager Kozel warned employee Barreau that if the Union came in, young employees like Barreau would be fired (J.A. 164; 67, 70-71, 76-77). In the week before the election, Kozel told employees, Bunker, Saladino and Haime, that the Company would reduce hours or close the store if

¹⁰ The Company's prior experience with the Meat Cutters Union was advanced as the basis for the asserted "good faith doubt" on the "genuineness" of the Union's card-based majority (J.A. 73, 138-139). The Trial Examiner found that experience to be equivocal at best, and, in any event, totally irrelevant to the issue of this Union's majority, at this time, and in this unit (J.A. 175-178).

The Company's post-election "reason" for ignoring the Union's representative status is discussed *in/ra* pp. 9-10.

the Union won the election (J.A. 164; 132-133, 134-135, 107-108).

And, finally, the Company mailed anti-Union letters to the employees on March 5, 11, and 12 (J.A. 165-167; 141-147, 50-51). As the Trial Examiner found, these three letters conveyed the clear promise of better working terms without the Union, and the warning of "worsening, unpleasant working conditions" if the Union won the election (J.A. 166-167). In short, the three letters "... were outspokenly antiunion and clearly designed to dissipate the Union's majority" support among the employees (J.A. 168, n. 13).

At the hearing the Company admitted the above facts, and in effect conceded they constituted violations of Section 8(a)(1) of the Act (J.A. 159, 163, 165; 36, 40, 68, 71-72).

C. The Company's Unfair Labor Practices Preclude the Possibility of a Fair NLRB Election.

The Union lost the March 16 NLRB election ten votes to fifteen (J.A. 160; 10). The Union filed objections to the election based on the Company's coercive tactics described above (J.A. 160-161; 11-13).¹¹ The Union also filed unfair labor practice charges on April 1 and 13, 1966 (J.A. 157, 161; 25-30). The hearing on the objections was consolidated

¹¹ The Union filed its objections on March 21 in brief, telegraphic form (J.A. 11), and a week later (March 28) submitted a detailed statement of those objections (J.A. 12-13, 18-19). The Company asked the Board to dismiss the objections on grounds they were not in proper form or were not timely filed (J.A. 161; 14-16). On May 18, 1966, the Board's Regional Director found that "... the objections were timely filed, and contained the necessary form and substance to comply with Section 102.69 of the Board's Rules and Regulations" (J.A. 162; 20). He also found the Company was not "... prejudiced by the manner of the filing of the objections". (*ibid.*). On June 2, 1966, the Board adopted the Regional Director's ruling (J.A. 162; 22-24). The Board noted that there were no exceptions to the Regional Director's Report (J.A. 162; 23).

with the unfair labor practice proceeding (J.A. 158; 38).

Following the election, the Company took further unlawful action against the employees' organizational effort. First, the Company rid itself of the known, leading "employee organizer"—Edward Kallas (J.A. 170; 86).¹² Company Manager Kozel was plainly displeased with Kallas' "dirty rotten trick" of organizing the employees (J.A. 89, 91, 136-137). Kozel, who was "a difficult man to work for" (J.A. 169), set out to make the job unbearable for Kallas. Kozel's abuse increased after the Union activity came out in the open (J.A. 171-172; 96-97, 106-107). Kallas testified that Kozel "... found fault with everything that was being done. I was no longer spoken to. . . . The only thing was the faults. I didn't know what was going to be in the paper, the sales, I wasn't told, I was never spoken to. If I said 'Good morning' I was never answered. I was only found fault with, talked to in a harsh way, continuing more so and more so, and finally [on April 8] I quit" (J.A. 172; 96-97). Kallas further testified that he was forced to quit because of "... ill health which was brought about because of pressure that was put on me because of the Union in those weeks and I could no longer take it. I was sick. . . . My nerves were all shot." (J.A. 172-173, 179, n. 25; 98). The Trial Examiner found that Kozel subjected Kallas "to virtually constant and unwarranted fault finding," that the resulting illness forced Kallas to leave (J.A. 170), and that Kozel's displeasure with Kallas' organizing activity was "a significant and substantial motivating factor" behind the forced departure (J.A. 173).

¹² "An employer who discharges the key union supporters in the plant strikes a crippling blow against the union, for he deprives the union of the 'inside' leaders on whom it depends to rally employee support behind the union. * * * Moreover, to achieve his objective, the employer need not even engage in multiple discharges; most union organizers said that one well-timed discharge is sufficient to defeat an organizing campaign." Wolkinson, "The Remedial Efficacy of NLRB Remedies in *Joy Silk Cases*," 55 Cornell L.Rev. 1, 9 (1969).

The Company failed to cross-examine Kallas or to introduce any evidence controverting the anti-Union motive for Manager Kozel's constructive discharge of Kallas (J.A. 173). Its position was that Kozel abused everyone, that Kallas would have quit anyway (as he had once before), and that an alleged offer of "reinstatement" with \$41.28 of "backpay" rendered the violation moot (J.A. 168-169, 170-171). The Trial Examiner had little difficulty in rejecting such "defenses" (J.A. 168-169, 173).

The Company undermined any lingering employee support for the Union by unilaterally increasing wages for 16 employees on June 4, 1966 (J.A. 179-180; 57, 38). With one possible exception, the increases amounted to 10 cents an hour (J.A. 57).¹³ Before the election Company Manager Kozel told the employees "... that the store just couldn't afford to go union" (J.A. 134, 107-108, 89).

The Board found that the Company's entire "... pattern of unlawful conduct ... was of such a nature as to have a lingering coercive effect," and that a "fair or coercion-free election" could not likely be obtained through the use of "traditional remedies" (J.A. 206). Accordingly, the Board, like the Trial Examiner (J.A. 182), set aside the results of the March 16, 1966, election and ordered the Company to bargain with the Union on the basis of the "more reliable," pre-unfair labor practice, authorization cards (J.A. 206).

At the hearing the Company did not seriously contest the unfair labor practices or their devastating impact on the NLRB election process. Rather the Company argued that "... bargaining relief is precluded because of the technicality of the objections not being timely filed or in

¹³ Even with the increases, these employees were earning substantially less than the Union's contract rates for full-time employees (Compare J.A. 57 with J.A. 156). In fact, most of the Company employees were working for less than the Union's bottom rate for *part-time* clerks—\$1.685 an hour (J.A. 57, 130, 156). This comparison does not take into account the Union's health and welfare benefits (J.A. 123-124).

sufficient form." (J.A. 74, 104). In her Decision, the Trial Examiner observed that the Regional Director had already ruled against the Company on this procedural "technicality", that the Company had failed to except to that ruling, and that the Board, on June 2, 1966, had ordered a hearing on the merits of the Union objections (J.A. 162, 174-175). (And see n. 11, *supra*.) The Board, for the second time, ruled against the Company when it adopted the Trial Examiner's findings (J.A. 204-206). Nonetheless, after the Board's Decision, the Company sought and obtained over a month's extension of time to file motions asking the Board to reconsider its twice-made ruling (J.A. 213-219, 220-222). The Company's motions admitted that its "sole defense to the refusal to bargain charge" is the stale, repeatedly rejected assertion that the Union objections do not comply with Board Regulations (J.A. 213-214).¹⁴ The Trial Examiner, but not the Board, found that such "defenses" have a bearing on the remedy to be devised for the unlawful refusal to bargain (J.A. 182, 206, 237).

II. The Trial Examiner Recommends a "Make-whole"¹⁵ Remedy for the Company's Flagrant Denial of the Employees' Right to Bargain Collectively.

The Trial Examiner carefully considered the Union's request for a remedy that recognized and took into account the measurable economic consequences of the Company's blatant refusal to bargain. The Union, through Secretary-Treasurer Moreth, established a firm factual foundation for such consequences in this case. Moreth testified that he knew of no unorganized food stores in the Beloit area that paid wages higher than those paid in Union stores (J.A. 130-

¹⁴ The Board denied the Company's motions on January 6, 1971 (J.A. 228-229).

¹⁵ The quotation marks reflect Petitioner's view that the proposed remedy does not make the employees completely whole for the losses suffered by the refusal to bargain. See *infra* p. 47.

131).¹⁶ He further testified that the Union's bargaining with the organized food stores in the Beloit-Janesville area is conducted on a uniform, area-wide basis (J.A. 187-188; 116-117, 119-121). While the employers sign individual printed copies of the agreement (J.A. 119), they all sit together in the negotiating meetings, bargain with the Union "all at the same time" (J.A. 119-120), and reach agreement on the same terms with the Union (J.A. 187-188; 119-121, 156). The wage schedules, health and welfare contributions,¹⁷ and other contract terms are exactly the same for all the food store employers "covered in the area agreement" (J.A. 120-121, 123-124). Moreth admitted that the Union's wage scale for the Madison area might differ by "one penny or two tenths of one penny"; but he firmly testified that there is no variation in the Union's wage schedule for Beloit-Janesville area employers (J.A. 122).

Moreth further testified that this policy of conforming to the area-wide wage scale carried over to newly organized stores. He candidly admitted that the Union did not always obtain a contract immediately after recognition, but that, "at the most," it took three or four months to execute the first contract (J.A. 187; 117). Moreth also acknowledged that, depending on the gap between existing wages and the Union's area-wide wage schedule, the Union at times granted a newly organized employer a period of time to "catch-up" to the prevailing area rates (J.A. 188-189; 126-127). He also conceded that this period might be as much as one year (J.A. 188; 127). But, through negotiation new employers eventually did "catch up" and did join the other employers in the joint negotiations for the uniform area agreement (J.A. 120, 124-127).

¹⁶ There are no other unions that represent food store clerks in this area (J.A. 131).

¹⁷ These employer contributions are made to the same insurance fund and, at the time of the hearing, they amounted to sixteen dollars a month for each employee working at least 24 hours a week (J.A. 123-124).

And, finally Moreth testified that most of the food stores under contract in the Beloit-Janesville area employ 20 to 30 clerks (J.A. 187; 116-117). The Company employed 26 in the bargaining unit at the date of the refusal to bargain (J.A. 56-57). Moreth did not accede to Company counsel's suggestion that the Union would necessarily make concessions to an "independent . . . small" 20-employee food store (J.A. 124-127). Moreth pointed out that 20 employees "... is not a small unit" (J.A. 125), and that the Union currently had contracts with two independent stores which dealt with the same distributor the Company dealt with (J.A. 123, 124).¹⁸

The Trial Examiner found that this evidence was sufficient to justify the entry of a "make-whole" remedy, with the exact amount of employee loss to be determined in a supplemental hearing (J.A. 189, 193). She found that "While it perhaps cannot be said with absolute certainty that bargaining would have resulted in benefits to the employees, the probabilities certainly favor such conclusion" (J.A. 183).¹⁹ The Examiner noted that "The law has always operated on the basis of 'probabilities', refusing to deny relief to an injured party simply because of his inability to prove the nature and extent of his injury with mathematical precision and beyond all possible doubt" (J.A. 185). The Trial Examiner found further justification for the remedy in the nature of the Company's unlawful con-

¹⁸ The Trial Examiner inadvertently placed one of these independents within the jurisdiction of the Union's sister local in Milwaukee (J.A. 188, n. 30; 124, 129).

¹⁹ The Trial Examiner was unwilling to assume that the Union would have achieved no increase in benefits through collective bargaining, noting that the mere presence of Union activity had brought about the Company's unilateral 10-cent an hour wage increases (J.A. 183, n. 27). Rather than make ironclad *assumptions* on the impact of collective bargaining, the Trial Examiner concluded that the *probabilities* were such as to permit the Union to prove the extent of that impact in a supplemental hearing (J.A. 187, 189).

duct and its impact on future bargaining. She observed that in her "... reading [of] multitudinous Board and court decisions [there were] few, if any, cases of the present type in which the employer's unfair labor practices were as flagrant and there was a similar virtually total absence of any defense or attempted explanation or justification" (J.A. 182). She recognized that the devastating effect of the unlawful conduct, coupled with the time required to litigate the Company's frivolous defenses, had substantially impaired the Union's ability to initiate meaningful collective bargaining under a conventional Board bargaining order (J.A. 182-183).

The Examiner found nothing in the "make-whole" remedy that would involve the Board in "... dictat[ing] the terms of a collective-bargaining agreement. Under the suggested remedy, the parties would be free of any restrictions on the scope of bargaining for the contract to govern their relationship in the future. The compensation would not be contractual but rather in the nature of 'compensatory damages' for the past" (J.A. 184-185).²⁰ In short, the Trial Examiner found a compensatory remedy for the Company's refusal to bargain was consistent with the Board's traditional remedial objective of reimbursing employees for losses sustained as a consequence of unfair labor practices (J.A. 189-190).²¹

²⁰ Concern not to "substitute contractual provisions for remedial processes of the law" and not to permit the Company to retain the "fruits of its misconduct" prompted the Trial Examiner to reject the Union's suggestion that the compensatory period be delayed to start 16 months after the Company's refusal to bargain (J.A. 190-191). At the hearing the Union was willing to adjust the compensatory award to reflect Union Representative Moreth's estimates on maximum time to negotiate the first contract (3 to 4 months) and to "catch up" to the area's prevailing wage-benefit levels (12 months). Upon reflection, the Union is now persuaded by the reasoning of the Trial Examiner.

²¹ Citing *Winn-Dixie Stores, Inc.*, 147 NLRB 788, 792 (1964), *aff'd.* in pertinent part 361 F.2d 512 (5th Cir. 1966): "Effectuation of the

III. The Board Denies the "Make-Whole" Remedy for Reasons Given in *Ex-Cell-O*.

On October 7, 1970, the Board issued its Decision in this case, affirming the Trial Examiner's findings of unfair labor practices²² and adopting her recommended order in all respects save the "make-whole" relief for the Company's refusal to bargain (J.A. 203-206).²³ In contrast to the Trial Examiner's careful, exhaustive analysis of the evidence, law, and policy considerations, the Board disposed of the remedial question with two sentences:

In our decision in *Ex-Cell-O Corporation*, we set forth our reasons for concluding that, in that case, a reimbursement remedy such as the Trial Examiner recommended in the instant proceeding should not be granted. Those reasons are equally applicable to the case now before us. (J.A. 206).

In *Ex-Cell-O*, 185 NLRB No. 20, the Board majority opinion²⁴ concedes "... that current remedies of the Board

Act's policies . . . requires that the employees whose statutory rights were invaded by reason of the Respondent's unlawful . . . action, and who may have suffered losses in consequence thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first place" (J.A. 189-190), quoted with approval in *International Union of Electrical Workers v. N.L.R.B. (Tiidee Products, Inc.)*, 138 U.S. App.D.C. 249, 255, 426 F.2d 1243, 1249 (1970), rehearing denied 75 LRRM 2350 (September 21, 1970), cert. denied 75 LRRM 2752 (December 7, 1970). This decision will at times be referred to simply as *Tiidee Products*.

²² The Board slightly modified the Examiner's rationale for granting the bargaining order, in light of the Supreme Court's decision in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969). (J.A. 206).

²³ Board Member Brown indicated he would grant the compensatory remedy. (J.A. 206, n. 5).

²⁴ The Board split 3 to 2 in *Ex-Cell-O*: Chairman Miller and Members Fanning and Jenkins voting against the remedy; Members McCulloch and Brown voting to sustain it.

designed to cure violations of Section 8(a)(5) are inadequate" (J.A. 234). It found that the customary bargaining order "... does not eradicate the effects of unlawful delay", does not restore employee "bargaining strength," and does not "dissolve the inevitable employee frustration" or protect against the loss of employee support for the union "attributable to such delay" (*ibid.*). The majority further concedes that this remedial inadequacy is "... all the more egregious where ... the employer [raises] 'frivolous' issues in order to postpone or avoid its lawful obligation to bargain" (*ibid.*).²⁵ Despite these glaring deficiencies and its broad remedial authority under Section 10(c) of the Act, the Board majority felt powerless to do anything other than enter the usual "inadequate" remedy and make sympathetic noises about "procedural reform" (J.A. 240-241).

The Board majority offered several reasons for its failure to try to devise a more effective remedy for employer refusals to bargain (J.A. 235-240). First, the majority stated that a monetary award might penalize those employers who, in good faith, wish to exercise their "procedural right" to contest NLRB representation findings by refusing to bargain, obtaining a "final" NLRB order, and seeking review of that order in the courts (J.A. 235-237). Such a refusal to bargain does not lie "... on the same plane as the discharge of employees for union activity or other conduct in flagrant disregard of employee rights" (J.A. 236). To impose "a large financial obligation" on these minor, technical "wrongdoers" who ultimately lose on a "debatable [representation] question," according to the majority, "... may come close to a form of punishment for having elected to pursue a representation question

²⁵ The majority noted (J.A. 234, 237) that this Court had found "frivolous," dilatory defenses raised in *International Union of Electrical Workers v. N.L.R.B. (Tüdee Products, Inc.)*, 138 U.S. App. D.C. 249, 426 F.2d 1243 (1970).

beyond the Board to the courts" (*ibid.*).²⁶ This Court's decision in *Quality Rubber*²⁷ was cited in support of this view (*ibid.*).

Having declined the remedy to avoid possible punishment of a good faith pursuit of judicial review, the Board majority proceeded to apply the same remedial policy to employers in open defiance of the Act, who seek access to the Board and courts solely for the purpose of delay (J.A. 237).²⁸ Here the majority, disagreeing with this Court's decision in *Tiidee Products* (*supra*), claims that it cannot determine whether a refusal to bargain rests on a "debatable question" or on some frivolous matter (*ibid.*) The distinction is said to be impractical or unwise because it allegedly involves a "subjective determination," could give rise to "intense litigation," or depends "... largely on the expertise of counsel, the accident of circumstances, and the exigencies of the moment" (*ibid.*). Such considerations prompted the majority to adopt a uniform policy of denying compensatory relief in every case, without regard to the underlying purpose or effect of the particular refusal to bargain.²⁹

The majority then cites the statutory policy of freedom of contract as justification for denying a "make-whole" remedy (J.A. 237-239). This policy, expressed in Section

²⁶ It is not clear how this reasoning is "equally applicable" (J.A. 206) to the remedy requested for Zinke's flagrant violations, deliberate delay, and total absence of any genuine representation issue.

²⁷ *United Steelworkers of America (Quality Rubber Mfg. Co.) v. N.L.R.B.*, —U.S. App.D.C. —, 430 F.2d 519 (1970).

²⁸ The only suggestion to cope with this "... pernicious delay in collective bargaining and consequent loss of benefits to employees" is amplified use of injunctive relief under Sections 10(j) and (e) of the Act (J.A. 237, n. 7).

²⁹ Compare *Tiidee Products*, 138 U.S.App.D.C. at 256, 426 F.2d at 1250.

8(d) of the Act,³⁰ requires that the Board not compel a party "to agree to any substantive contractual provision of a collective bargaining agreement"³¹ and not "... step in and become a party to the negotiations" (J.A. 238). Although there were no negotiations to intervene in and no substantive proposals to compel agreement to, the majority felt that any compensatory remedy would contravene the parties' freedom of contract. In its opinion such a remedy necessarily "... flow[s] from a *presumed* contractual agreement," and would require the Board to infer that the presumed contract "... was *denied* existence by the employer because of his refusal to bargain" (J.A. 238-239). In short, the "make-whole" remedy is seen as nothing more than a retroactive contract term, which, like the prospective provision in *H. K. Porter* (n. 31 below), is forced "willy-nilly" on the employer "... as though he had agreed to it" (J.A. 239). Evidence as to a union's successful experience in obtaining greater benefits through collective bargaining will not suffice, even when that evidence is "substantial" (*ibid.*). Any attempt to extrapolate from collective bargaining experience is rejected because it would require the Board "... to engage in the most general, if not entirely speculative, inferences" (J.A. 239-240). While they "... appreciate the need for more adequate remedies in 8(a)(5) cases," the members of the majority refer employees to Congress for a solution (J.A. 240). Meanwhile, they promise "procedural reform" (*ibid.*).

Members Brown and McCulloch, dissenting, found ample authority, in Section 10(c) of the Act, to devise a remedy that attempts to dissipate the effects of the unlawful refusal to bargain, to restore conditions that would have prevailed absent the unlawful conduct, and to restrain, and remove

³⁰ Section 8(d) defines the duty to bargain collectively and then states: "... but such obligation does not compel either party to agree to a proposal or require the making of a concession."

³¹ *H. K. Porter Co., Inc. v. N.L.R.B.*, 397 U.S. 99 (1970).

incentives for, further like violations (J.A. 242-253). They also found a pressing need to encourage collective bargaining through an effective, "make-whole" remedy for employer refusals to bargain (J.A. 253-258). Such a remedy would remove the economic gain an employer achieves by postponing his duty to bargain through litigation, and it would partially restore to employees the economic losses resulting from the refusal to bargain (*ibid.*). Neither the employer's right to judicial review (J.A. 256-257, n. 50) nor his freedom of contract (J.A. 259-260) operate to preclude relief. And, finally, existing legal principles, the Board's administrative experience, and available economic data from public and private sources were found adequate to ascertain the amount of employer gain and employee loss in refusal to bargain cases (J.A. 260-267). Citing this Court's opinion in *Tiidee Products*, the dissenting members felt that any difficulty in determining that amount "... is not reason enough for the Board to shirk its statutory responsibilities, and no reason at all ... in a case such as this where that difficulty is not present" (J.A. 267-268).

SUMMARY OF ARGUMENT

Petitioner contends that Section 10(c) of the Act contains ample authority for a Board "make-whole" remedy for the Company's flagrant denial of its employees' right to bargain collectively. This remedy falls well within Section 10(c)'s "broad command" to dissipate or undo the consequences of statutory violations. It is consistent with the Board's practice of providing "make-whole" relief for other unfair labor practices.

The Board's failure to exercise its statutory remedial power results from a failure to recognize or fully appreciate the economic consequences of an employer refusal to bargain, and a failure to coordinate the various statutory policies involved. It is a widely acknowledged economic fact that collective bargaining generally operates to in-

crease employee wages and benefits. In the present record, the Union established that its bargaining had such an impact. Thus, the Company has profited from its refusal to bargain and the delay in litigating its frivolous defenses; its savings in labor costs came at the expense of the employees' loss of bargaining rights. The Board made no attempt to undo these dual economic consequences of the Company's unlawful conduct. In addition, rather than attempt to accommodate or balance the employees' right to bargain collectively in its remedy, the Board made this employee right totally subservient to the employer right to judicial review and freedom of contract. In short, the Board attached virtually no legal consequences to the Company's unlawful refusal to bargain, and has, in effect, deprived the employees of their substantive right to organize and bargain collectively with the Company.

The proposed remedy is neither speculative nor unduly burdensome to administer. Petitioner submits that the economic data so convincingly establishes the overall positive impact of collective bargaining on employee compensation that the Board should permit a particular union to prove the average effect its bargaining would have on a particular employer. The Union is not asking the Board to presume that a specific contract or contract term would have occurred had the Company bargained. The Board should presume only that, but for its violations, the Company would have bargained in good faith. As measure of the economic results of such bargaining, the Board should look to the Union's evidence of its experience in good faith bargaining with other food store employers. The Board's remedy would not impose a contract, but would merely put the employees and Company in the average first bargaining situation experienced by this Union in this industry and in this area. In supplementary proceedings the Company will be free to prove that it is not typical or average. This approach permits employee losses to be reasonably approxi-

mated without foreclosing the employer's argument that he is factually atypical. It would also be no more difficult or burdensome to administer than the Board's backpay awards for unlawful discrimination. Like the backpay remedy, the proposed relief would foster compliance with the Act.

The "make-whole" remedy would in no way restrict the parties' freedom to contract for whatever terms they wish once good faith bargaining commences. Until such bargaining begins, the Company cannot plead "freedom of contract" as a bar to compensatory relief for its denial of any and all bargaining. The Company's right to obtain judicial review of a "debatable" representation question is not involved in this proceeding. But in other cases the Board can easily accommodate this procedural right with the employees' substantive right to representation in collective bargaining. A "make-whole" remedy which recognizes and implements that employee right is needed not only to repair the harm this Company inflicted on its employees, but also to curtail extended use of willful violation and deliberate delay as an employer tactic against lawful organizing efforts.

ARGUMENT

THE NATIONAL LABOR RELATIONS BOARD HAS ABDICATED ITS STATUTORY RESPONSIBILITY BY FAILING TO MAKE ANY EFFORT TO DEVISE A COMPENSATORY REMEDY FOR THE COMPANY'S FLAGRANT DENIAL OF ITS EMPLOYEES' RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY.

- I. The Board Has Ample Remedial Authority Under Section 10(c) of the Act to Dissipate the Economic Consequences of the Company's Refusal to Bargain.**

The central statutory policy entrusted to the Board is the encouragement of "the practice and procedure of collec-

tive bargaining." Section 1 of the Act. As this Court recently stated, "The obligation of collective bargaining is the core of the Act, and the primary means fashioned by Congress for securing industrial peace."³² *International Union of Electrical Workers v. N.L.R.B. (Tidee Products, Inc.)*, 138 U.S.App.D.C. 249, 255, 426 F.2d 1243, 1249 (1970), rehearing denied 75 LRRM 2350 (September 21, 1970), cert. denied 75 LRRM 2752 (December 7, 1970) (hereafter "*Tidee Products*"). In Section 10(c) of the Act,³³ Congress "... charge[d] the Board with the task of devising remedies to effectuate" this policy objective. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). The Board's "affirmative action" remedies are designed "... to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 236 (1938). See also *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 215-217 (1964); *Virginia Electric Power Co. v. N.L.R.B.*, 319 U.S. 533, 539-540, 543-544 (1943). Cf. *Local 60 Carpenters v. N.L.R.B.*, 365 U.S. 651, 655 (1961). By removing the gains and compensating the losses that result from the unfair labor practice, the Board seeks "... a restoration of the situation, as nearly as possible, to that which would

³² Or, as one commentator phrased it, "... success in preventing industrial strife through collective bargaining depends on enforcement of the statutory obligation to bargain in good faith." Note, "The Need for More Creative Orders Under Section 10(c) of the National Labor Relations Act", 112 U.Pa.L.Rev. 69, 83-84 (1963).

³³ "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

have obtained but for" the unlawful conduct. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941). Such a restorative remedy may properly exert a deterrent or restraining influence on further violations. *N.L.R.B. v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). In addition, Section 10(c) envisions that the Board will consider and incorporate the realities of industrial relations when framing its affirmative orders. Congress could not "... define the whole gamut of remedies to effectuate these [statutory] policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941).³⁴ "[T]he Board must draw on enlightenment gained from experience." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).³⁵

The Board thus has a broad mandate to provide affirmative remedies which advance the statutory objectives. The only limitations are that Board orders (1) be "... related

³⁴ Before the Board, Intervenor Company argued that Section 10(c)'s phrase "affirmative action including reinstatement of employees with or without back pay" was meant to narrow the scope of the Board's remedial power. The contention was not adopted by the Board majority in *Ex-Cell-O* (J.A. 230-241), and was succinctly answered by the dissent (J.A. 242-245). See also, *Virginia Electric Power Co. v. N.L.R.B.*, 319 U.S. 533, 539 (1943). (Affirmative action is "... not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay."). For a discussion of the legislative history of Section 10(c), see, Note, "The Need for More Creative Orders Under Section 10(c) of the National Labor Relations Act", 112 U.Pa.L.Rev. 69, 71-76 (1963); Note, "Monetary Compensation As A Remedy for Employer Refusal to Bargain", 56 Georgetown L.J. 474, 486-487 (1968).

³⁵ In *Seven-Up*, the Supreme Court approved a new method of computing back pay, noting that it was based upon the Board's "cumulative experience" and designed to eliminate the adverse effects of the old formula. *Id.* at 347-348. *F. W. Woolworth Co.*, 90 NLRB 289, 291 (1950).

to the proven unlawful conduct,"³⁶ (2) not restore more than was set awry by the unfair labor practice,³⁷ and (3) "... give coordinated effect to the [various] policies of the Act."³⁸ Absent any such policy limitation, the Board should make a determined effort to devise an effective remedy for every type of unfair labor practice. Difficulty in quantifying or administering a compensatory remedy is no grounds for denying relief.³⁹ The victims of unfair labor practices are entitled to some tangible evidence that the Act does *in fact* protect the right to organize and bargain collectively. In short, "[t]he 'affirmative action' clause of § 10(c) is not a mere charter of authority that the Board has the option to exercise or ignore. It is, as the [Supreme] Court has recently stated, a 'broad command' *N.L.R.B. v. J. H. Butter-Rex Mfg. Co.*, 396 U.S. 258." *Tiidee Products*, 138 U.S. App. D.C. 249, 255, 426 F.2d 1243, 1249 (1970).

It is thus evident that employees need not appeal to Congress for an effective remedy for denial of their right to collective bargaining. A compensatory remedy for initial refusals to recognize and bargain with a properly desig-

³⁶ *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 433 (1941); *Virginia Electric Power Co. v. N.L.R.B.*, 319 U.S. 533, 543-544 (1943).

³⁷ *Local 60 Carpenters v. N.L.R.B.*, 365 U.S. 651, 654-656 (1961); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198-200 (1941); *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 11-13 (1940); *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 235-238 (1938). While this has been termed the "punitive" limitation, Petitioner will follow Justice Frankfurter's preference for dealing with the realities of statutory policy rather than "... entering into the bog of logomachy ... by debate about what is 'remedial' and what is 'punitive'." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953).

³⁸ *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953). See also, *Local 57, Garment Workers v. N.L.R.B.*, 126 U.S.App.D.C. 81, 88-94, 374 F.2d 295, 302-308 (1967), cert. denied 387 U.S. 942 (1967).

³⁹ *Tiidee Products*, 138 U.S.App.D.C. at 257, 426 F.2d at 1251; *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198-199 (1941).

nated employee representative⁴⁰ is well within the Board's "command" to undo the consequences of the violation. This Court has so held. *Tiidee Products*, 138 U.S.App.D.C. 249, 426 F.2d 1243 (1970); *Food Store Employees Union, Local No. 347, Meat Cutters v. N.L.R.B. (Heck's Inc.)*, — U.S. App.D.C. —, 433 F.2d 541 (1970). Cf. *Southwest Regional Joint Board, Amalgamated Clothing Workers v. N.L.R.B. (Levi Strauss & Co.)*, — U.S. App.D.C. —, — F.2d —, 76 LRRM 2033 (December 15, 1970); *United Steelworkers of America (Quality Rubber Mfg. Co.) v. N.L.R.B.*, — U.S. App.D.C. —, 430 F.2d 519 (1970); *Retail, Wholesale and Department Store Union v. N.L.R.B. (Saks & Co.)*, 128 U.S. App.D.C. 41, 47-48, 385 F.2d 301, 307-308 (1967).

II. The Board's Failure to Exercise its "Make-whole" Power for the Company's Refusal to Bargain Is Contrary to its Remedial Pattern for Other Unfair Labor Practices, Overlooks the Economic Consequences of the Violation, and Distorts Statutory Policies.

A. NLRB "Make-whole" Remedies for other Unfair Labor Practices Support Similar Relief for the Company's Unlawful Refusal to Bargain.

In remedying other types of unfair labor practices, the Board uniformly attempts to repair the economic harm that results directly from the violation.⁴¹ Thus, the Board has

⁴⁰ Refusal to bargain violations arising in established bargaining relationships present different factual and policy considerations. The Board denied a compensatory remedy for an 8(a)(5) refusal to bargain during second contract negotiations in *Rasco Olympia, Inc.*, 185 NLRB No. 110 (1970). While not conceding that compensatory relief is inappropriate in this context, *Retail Clerks Local No. 309* has withdrawn its petition to review the Board's *Rasco* Decision (D.C. Cir. No. 24703) in order to focus attention on the pressing need for an adequate 8(a)(5) remedy in the initial organizing situation.

⁴¹ The Board does not attempt a restoration of indirect losses, incidental to the unfair labor practice, such as medical payments for in-

not confined itself to reimbursing employees for lost wages and benefits resulting from unlawful discrimination.⁴² The Board has ordered reimbursement for unlawfully exacted union dues, fees, and disciplinary fines.⁴³ It also requires employers to compensate employees for losses flowing from an 8(a)(5) refusal to sign or honor an agreed upon contract⁴⁴ or unilateral change in job conditions.⁴⁵ The Board has even ordered employee negotiators to be made whole for losses in pay resulting from an employer's bad faith bargaining.⁴⁶ The Board recognizes that Section 8(a)(5)

injuries sustained from coercive picket line misconduct. See e.g. *International Hod Carriers, Local 916*, 145 NLRB 565 (1963). "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." *U.A.W. v. Russell*, 356 U.S. 634, 643 (1958). See also, *United Construction Workers v. Laburnam Construction Corp.*, 347 U.S. 656, 665 (1954). The relief sought in this proceeding falls short of complete, general damages for destruction of the bargaining right or relationship. It seeks recovery for a limited part of the total harm inflicted by the Company's refusal to bargain—the direct and immediate loss of increased wages and certain fringe benefits. See discussion *infra* p. 47.

⁴² The "back pay" awards for violation of Sections 8(a)(3) and 8(b)(2). See generally: Parker, "Monetary Recovery Under the Federal Labor Statutes", 45 Texas L.Rev. 881, 882-892 (1967); Note, "A Survey of Labor Remedies", 54 Va.L.Rev. 38, 73-90 (1968).

⁴³ *Virginia Electric Power Co. v. N.L.R.B.*, 319 U.S. 533, 543-544 (1943); *The Richard W. Kaase Co.*, 141 NLRB 245, 249-250 (1963), *enf'd* as modified 346 F.2d 24 (6th Cir. 1965); *Bricklayers and Masons Local No. 2 (Weidman Metal Masters)*, 166 NLRB 117 (1967).

⁴⁴ *N.L.R.B. v. Strong*, 393 U.S. 357, 359-362 (1969); *George E. Light Boat Storage, Inc.*, 153 NLRB 1209, 1220-1221 (1965), *enf'd* as modified 373 F.2d 762, 768-769 (5th Cir. 1967); *Schill Steel Products, Inc.*, 161 NLRB 939, 941 (1966).

⁴⁵ *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216-217 (1964); *Leeds & Northrup Co.*, 162 NLRB 987, 988 (1967), *enf'd*. 391 F.2d 874, 879-880 (3rd Cir. 1968); *American Fire Apparatus Co.*, 160 NLRB 1318, 1319 (1966), *enf'd*. 380 F.2d 1005, 1006-1007 (8th Cir. 1967); *American Smelting & Refining Co.*, 167 NLRB 204, n. 2 (1967).

⁴⁶ *M.F.A. Milling Co.*, 170 NLRB No. 111 (1968).

cases frequently require a compensatory remedy to prevent the wrongdoing employer from profiting from his violation.⁴⁷ A similar concern in Section 8(a)(3) cases precludes the violator from shifting the consequences of Board delay on to the employees.⁴⁸ Where relevant, the Board uses a collective bargaining agreement as the measure of the economic loss inflicted by the unfair labor practice.⁴⁹ The difficulty in determining the precise nature or amount of employee loss has not deterred the Board. It has always tried to find some reasonable basis for approximating the losses, and placed the burden on the wrongdoer to prove the qualifying or mitigating circumstances.⁵⁰ And, in other areas, the Board has evaluated the effectiveness of its remedies and has sought to align them with new insights and developments in industrial relations.⁵¹

In stark contrast, the Board has held firmly to the same refusal to bargain remedy that it devised in 1935-1936:

⁴⁷ *Leeds & Northrup Co. v. N.L.R.B.*, 391 F.2d 874, 880 (3rd Cir. 1968); *Hooker Chemical Corp.*, 186 NLRB No. 49, TXD at pp. 12-13 (1970); *A. H. Belo Corp.*, 170 NLRB No. 175, TXD at pp. 19-20 (1968), enf'd. 411 F.2d 959 (5th Cir. 1969).

⁴⁸ *N.L.R.B. v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264-265 (1969).

⁴⁹ *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216-217 (1964); *Hen House Market No. 3*, 175 NLRB No. 100 (1969), enf'd. 428 F.2d 133, 136-138 (8th Cir. 1970); *Petrolane-Franklin Gas Service, Inc.*, 174 NLRB No. 88, TXD at pp. 23-24 (1969).

⁵⁰ *The Buncher Co.*, 164 NLRB 340 (1967), enf'd. 405 F.2d 787 (3rd Cir. 1968); *American Fire Apparatus Co. v. N.L.R.B.*, 380 F.2d 1005, 1006-1007 (8th Cir. 1967); *F. W. Woolworth Co. v. N.L.R.B.*, 121 F.2d 658, 662-663 (2nd Cir. 1941).

⁵¹ *F. W. Woolworth Co.*, 90 NLRB 289 (1950); *Isis Plumbing and Heating Co.*, 138 NLRB 716 (1962), principle affirmed in *International Brotherhood of Operative Potters v. N.L.R.B.*, 116 U.S.App.D.C. 35, 38-39, 320 F.2d 757, 760-761 (1963); *A.P.W. Products Co., Inc.*, 137 NLRB 25 (1962), enf'd. 316 F.2d 899 (2nd Cir. 1963); *Elson Bottling Co.*, 155 NLRB 714 (1965), enf'd. as modified, 379 F.2d 223 (6th Cir. 1967); *American Mfg. Co.*, 167 NLRB 520, 522-523 (1967).

cease and desist from refusing to bargain and, affirmatively, to bargain with the union. See *Delaware-New Jersey Ferry Co.*, 1 NLRB 85, 96 (1935); *St. Joseph Stockyards*, 2 NLRB 39, 56 (1936). Despite the almost universal recognition that this is not now an adequate remedy,⁵² the Board majority is unwilling to make a try at improving its 8(a)(5) orders. It is apparent that the Board majority is content to abandon meaningful enforcement of the duty to bargain with nothing more than a promise of "procedural reform" (J.A. 240). Petitioner submits that effective enforcement of this "core" duty in the critical, initial bargaining situation should receive priority in the administration of the Act. Petitioner believes that the Board's inaction results from its failure (1) to recognize or fully appreciate the hard economic realities of employer refusals to bargain, and (2) to coordinate employee bargaining rights with other statutory policies.

B. The Board Overlooks the Economic Consequences of the Company's Unlawful Refusal to Bargain.

1. Economic data substantiate that employer gains and employee losses result from a refusal to bargain.

It is unfortunate that courts must be called upon to direct the Board's attention to industrial realities. A full appreciation of those realities is the essence of the Board's

⁵² See "Administration of the Labor-Management Relations Act by the NLRB", Subcommittee on NLRB (Pucinski, Chairman) of the House Committee on Education and Labor, 87th Cong., 1st Sess. (Comm. Print 1961), pp. 1-2; Ross, *The Labor Law in Action* (1966), p. 2; Comment, "NLRB Remedial Orders: A Permissive Voice in Substantive Collective Bargaining?", 65 *Northwestern L.Rev.* 441, 443-444 (1970); Wolkinson, "The Remedial Efficacy of NLRB Remedies in *Joy Silk Cases*", 55 *Cornell L.Rev.* 1, 32-33 (1969); Comment, "The *H. K. Porter* Experiment in Bargaining Remedies: A Study in Black and Wright", 56 *Va.L.Rev.* 530, 531-532 (1970).

"expertise" and the underlying reason for its existence.⁵³ The Board majority in *Ex-Cell-O* asks "Who is to say . . ." what are the likely consequences of collective bargaining (J.A. 239). Petitioner submits that the Act imposes some responsibility on the Board to provide meaningful answers to this and other aspects of the pressing remedial deficiency in Section 8(a)(5) cases. It is no answer to ship the problem back to Congress.

It is clear that Congress recognized the economic impact of employee organization and bargaining when it adopted collective bargaining as the means for achieving industrial peace. In its statement of findings and policy (Section 1 of the Act) Congress declared:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by . . . (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the

⁵³ "[W]here courts were unable to inform themselves about the complexities of modern industry, agencies were to collect data and fashion remedies for unique problems in many different segments of an industrial society." Bernstein, "The NLRB's Adjudication—Rulemaking Dilemma Under the Administrative Procedure Act", 79 Yale L.J. 571, 572 (1970). See also the views of Senator Robert Wagner quoted in Keyserling, "The Wagner Act: Its Origin and Current Significance", 29 Geo.Wash.L.Rev. 199, 223-224 (1960).

purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.⁵⁴

The Congressional judgment on the overall economic impact of collective bargaining has been substantiated by the empirical studies of economists.⁵⁵ On the basis of existing studies and his own analysis, economist H. Gregg Lewis concluded "... that 'normally'—that is, apart from periods of unusually rapid inflation—the effect of unionism on the

⁵⁴ Senator Wagner insisted on this policy statement, since the "... central argument for his bill was always on general economic and social grounds. He never valued the measure primarily as a mere weapon for negating industrial strife, but rather as an affirmative vehicle for the economic and related social progress to which his life-long efforts were devoted". Keyserling, "The Wagner Act: Its Origin and Current Significance", 29 *Geo.Wash.L.Rev.* 199, 218 (1960). Although the Act has been amended several times since 1935, its original policy statement remains intact.

⁵⁵ These studies were concerned with observable facts, not with economic theories or models of wage determination. Petitioner does not expect the Board to become involved in the economists' struggle with wage theory. Section 4(a) of the Act prohibits the Board from employing "individuals for the purpose of . . . economic analysis." But that Section provides no excuse for ignoring the factual observations and conclusions of economists. Nor would it preclude the Board from considering economic data presented by parties in an adversary or rule-making proceeding. See Bernstein, "The NLRB's Adjudication—Rule-making Dilemma Under the Administrative Procedure Act", 79 *Yale L.J.* 571, 576-578 (1970).

average wage of all union workers relative to the average wage of all nonunion workers was at least 10 per cent." *Unionism and Relative Wages in the United States* (1963), pp. 190-191. See also pp. 4-5, 193-194, 222.⁵⁶ Similarly, Albert Rees estimated that "... the average effects of all American unions on the wages of their members in recent years would lie somewhere between 10 and 15 per cent." *The Economics of Trade Unions* (1962), p. 79.⁵⁷ Dr. Harold M. Levinson made an exhaustive study of bargaining in six west-coast industries during 1945-1962. *Determining Forces in Collective Wage Bargaining* (1966). He concluded that "... the most important finding that emerged from these empirical studies was that unionism did appear as an important force influencing the rate of change of wages and that, at least during certain periods of time, collective bargaining had generated wage outcomes different from what would be expected under nonunion conditions." *Id.* at p. 15.

Further support for the positive impact of collective bargaining is found in data compiled by the Department of Labor's Bureau of Labor Statistics. The BLS makes a union-nonunion comparison of earnings in some of its In-

⁵⁶ This estimate was based solely on straight-time hourly earnings (*Id.* at p. 10), and thus does not include the unions' success in obtaining greater "fringe" benefits, such as shift differentials, premium pay, paid vacations and holidays, health, welfare, and pension plans.

Lewis found collective bargaining's greatest impact came during the depression when unions were able to prevent wage cuts. *Id.* at pp. 4, 193-194, 222.

⁵⁷ It should be noted that Rees and Lewis represent a school of economic thought which is not exactly enthusiastic about the economic impact of unions. See Milton Friedman, "Some Comments on the Significance of Labor Unions for Economic Policy", *The Impact of the Union* (Wright Ed., 1951), pp. 204-234. Friedman himself estimated that unions were able to raise earnings 15 per cent in organized sectors of the labor force. *Id.* at pp. 215-216. This was thought to dispel the "exaggerated" role of unions in wage determination. *Id.* at pp. 221-226.

dustry Wage Surveys⁵⁸ and Current Wage Developments.⁵⁹ An analysis of 1960-1965 BLS data for 23 manufacturing industries revealed that the union wage exceeded the non-union wage, on average, by 18 per cent. Vernon T. Clover, "Compensation in Union and Nonunion Plants, 1960-1965," 21 *Industrial & Labor Relations Review* 226 (1968). Clover found "[t]his highly prevalent condition of higher wages in union than in nonunion plants is emphasized by the fact that it not only was found in nearly all regional surveys, but also existed under a variety of conditions involving [a number of] regional differences. . . ." *Id.* at 227. He concluded that ". . . unions caused higher straight-time monetary wage rates than would have existed if there had been no unions." *Id.* at 229.⁶⁰ He also found that unions were more effective in getting increased fringe benefits. *Id.* at 230-231, 233.⁶¹ In sum, "[b]oth common sense and a substantial body of statistical evidence suggest that trade

⁵⁸ See e.g. *Men's and Boys' Shirts*, October 1968, BLS Bulletin No. 1659 (1970), pp. 2, 7, 8; *Wood Household Furniture*, October 1968, BLS Bulletin No. 1651 (1970), pp. 2, 11-13.

⁵⁹ See e.g. BLS Current Wage Developments No. 269 (May 1, 1970), pp. 33, 36-39, 43. And see, Kinyon, "Wage Developments in Manufacturing, 1969", 93 *Monthly Labor Review* No. 7 (1970), 35-39.

The BLS defines "union" establishments as ". . . those in which a majority of the production and related workers are covered by union agreements." BLS Current Wage Developments No. 269, at p. 32.

⁶⁰ A less explicit conclusion as to the union-nonunion significance of the BLS data can be found in Weiss, "Concentration and Labor Earnings", 56 *American Economic Review* 96, 114-116 (1966). However, Weiss was focusing primarily on the effect that industrial concentration had on wages rather than the union-nonunion variable. *Id.* at 97-98.

⁶¹ See also, Arnold Strasser, "The Changing Structure of Compensation", 89 *Monthly Labor Review* 953, 957-958 (1966).

The BLS estimates that supplementary "fringes" (i.e., over and beyond straight-time pay) amount to about 20 percent of total employee compensation. See Alvin Bauman, "Measuring Employee Compensation in U.S. Industry", 93 *Monthly Labor Review* No. 10 (1970), 17, at 23; BLS *Handbook of Labor Statistics* 1970, p. 278.

unions raise the wages of the workers covered by collective bargaining agreements." Rees and Schultz, *Workers and Wages in an Urban Labor Market* (1970), p. 181.⁶²

Petitioner submits that the above economic data convincingly establish that, overall, collective bargaining does make a difference, that unions do generally achieve a boost in wages and benefits for the employees they represent.⁶³ There is nothing speculative here. The hard, economic realities as to collective bargaining should permit a particular union to prove that its bargaining also has a positive impact, that its experience in initial bargaining situations indicates a high likelihood of increased labor costs for a particular employer unlawfully refusing to bargain. To deny unions that opportunity for proof, as the Board majority has done, is to reduce all unions to zero effectiveness. And that result flies in the face of the firmly established economic nature of collective bargaining.

The initial organizing situation is significant in several respects. First, the union's economic impact here is usually greater than the overall, long-term effects outlined above. "The introduction of collective bargaining into an industry or sector is likely to be associated with an initial rise in compensation. A successful organizing campaign calls for substantial wage increases for the newly organized. A union typically confronts management with a new operational situation that may require considerable adjustment,

⁶² It has also been recognized that the "threat" of collective bargaining induces many unorganized employers to raise their wages in order to forestall or avoid unionization. See Reynolds, *Labor Economics and Labor Relations* (5th Ed. 1970), p. 622; Rees & Schultz, *Workers and Wages in an Urban Market* (1970), pp. 45-46. This "threat" effect tends to understate collective bargaining's true impact on wage rates in an industry. Reynolds, *supra*, at p. 622.

⁶³ Recognition of this impact is also reflected in certain management tirades against union economic power and "cost-push" inflation. Petitioner doubts that the word "speculative" ever appears in this context.

and these circumstances are likely to produce large wage and benefit increases in negotiations." Bok & Dunlop, *Labor and the American Community* (1970), p. 288. See also Paul H. Douglas, *Real Wages in the United States, 1890-1926* (1930), pp. 562-564. Studies by Philip Ross showed that about 86 percent of all newly certified unions were successful in obtaining bargaining agreements. *The Labor Law in Action* (1966), pp. 12, 16. And the Ross investigation of some 150 Automobile Workers' first bargaining situations revealed a median increase in wage-fringe benefits of 25 cents an hour, or 8 per cent (UAW brief before NLRB in *Ex-Cell-O*, pp. 13-14, and Appendix C).

The first bargaining situation also isolates the union as a causative factor. The other items that enter into wage determination—labor productivity and skills, level of unemployment, employer's size, product market, and geographical location, and the like—are not likely to vary over the relatively short period of initial organization and contract negotiation.⁶⁴ Thus, the union can rightfully claim credit for any increased wages and benefits achieved in the first agreement.

The fact that collective bargaining has this substantial impact at the outset is not lost on the employees or employers. "Workers at many newly organized establishments, private or public, are relatively low paid; this very state of affairs may have helped to induce organization." Bok & Dunlop, *Labor and the American Community* (1970), p. 288. In a recent AFL-CIO survey, employees ranked the following as the top two reasons for voting for a union:

⁶⁴ In devising a "make-whole" remedy for the unlawful initial refusal to bargain, the Board need not be concerned with bargaining's long-term impact on labor's share of income relative to that of land and capital. Cf. St. Antoine, "A Touchstone for Labor Board Remedies", 14 Wayne Law Review 1039, 1046-1047 (1968). All that is involved is a short-term, dollar and cents comparison between collective bargaining and no collective bargaining.

"1. Union representation and collective bargaining ensure better pay and job security. 2. Improved fringe benefits such as pensions, holidays and sick leave." William L. Kircher, "Yardstick for More Effective Organizing," 76 *American Federationist* No. 3, p. 21, at p. 23 (1969).⁶⁵ These factors were undoubtedly present in this case. Many of the Company's employees were earning \$1.25 and \$1.35 an hour (J.A. 130), substantially below the benefits Union representative Moreth showed them in the Union's area contract (J.A. 84, 156).

Employers are not quite as open about admitting the big impact that initial bargaining has on their labor costs. However, a recent study revealed a number of employers who committed other severe unfair labor practices in refusing to bargain, and who litigated these violations "against the advice of their attorneys, because they found it [economically] advantageous to do so. * * * Thus, for many employers, the process of litigation becomes a business proposition." Wolkinson, "The Remedial Efficacy of NLRB Remedies in *Joy Silk* Cases," 55 *Cornell L. Rev.* 1, 32 (1969). One employer interviewed in this study stated: "For five years I was able to run the business without even talking or negotiating in any way with the union. This itself saved me \$100,000." *Id.* at p. 32, n. 83. Thus, the initial refusal to deal with a union is often motivated by a cold calculation of the added labor costs resulting from collective bargaining. From the employer's point of view, there is clearly nothing prohibitively speculative about that calculation.⁶⁶

An unlawful refusal to bargain thus has definite eco-

⁶⁵ Also reported in *BNA Labor Relations Yearbook* 1969, pp. 421, 423.

⁶⁶ See also, Ross, *The Government as a Source of Union Power* (1965), p. 243: "In short, an employer who persists in out-and-out opposition to collective bargaining in the form of violations of the law runs certain risks, but those risks are ordinarily known and measurable."

conomic consequences for both employers and employees. The cost savings gained by the employer from the violation is precisely the loss in earnings inflicted on the employees. Usually, both the attempt to exercise the bargaining right and its ultimate frustration are economically motivated. In addition, the present record establishes an extremely high probability that this Union's bargaining does in fact produce increased wages and benefits. The undisputed facts show that the Union's uniform first contract experience is to negotiate newly organized employers up to the prevailing wage scale in the Union's area-wide agreement. The Company's wages were substantially below that scale. Thus, Congress, economists, employees, unions, employers and the evidence in the present case all recognize and substantiate the fact that a refusal to bargain has a direct, dual, monetary impact: profit to employer and loss to employees.

It is not clear whether the Board majority shares this comprehension of the economic realities. The majority opinion in *Ex-Cell-O* makes passing reference to employee "frustration," diminution of "bargaining strength," and "loss of benefits." (J.A. 234, 237, n. 7). If that constitutes a recognition of the economic consequences of the violation, Section 10(c) clearly imposes an obligation to undo those consequences. See discussion *supra*. The majority's failure to even attempt a restoration of the economic harm through a compensatory remedy thus indicates that the Board has omitted or overlooked the economic realities of collective bargaining. Such an oversight undercuts the validity of Board policy determinations. "When the Board does make policy, it should base its decision on the realities of industrial relations: indeed that was the major reason for creating the Board. Only thus can it fashion rules of conduct that promote healthy labor relations and reduce rather than stimulate litigation." Bernstein, "The NLRB's Adjudication—Rulemaking Dilemma under the Administrative Procedure Act," 79 Yale L.J.

571, 574-575 (1970). Unfortunately, but predictably, the Board's *Ex-Cell-O* position will serve only to encourage lengthy litigation of frivolous employer defenses.

2. Litigation delays aggravate the economic harm to employees resulting from the refusal to bargain.

The problem of delay in Board proceedings has been around for some time.⁶⁷ The Board has made some progress in reducing delays.⁶⁸ Petitioner appreciates those efforts and the Board's attempts to further expedite its case handling. Petitioner's complaint lies in the Board's failure to recognize the irreducible and especially harmful

⁶⁷ See Report of the Advisory Panel on Labor-Management Relations Law, "The Organization and Procedure of the National Labor Relations Board" (Archibald Cox, Chairman) to the Senate Committee on Labor and Public Welfare, S. Doc. No. 81, 86th Cong. 2nd Sess. (1960), pp. 1-8; James M. Landis, "Report on Regulatory Agencies to the President Elect," Submitted by Chairman of the Subcommittee on Administrative Practice and Procedure to the Senate Committee on the Judiciary, 86th Cong. 2nd Sess. (Comm. Print 1960), pp. 64-65; "Administration of the Labor-Management Relations Act by the NLRB," Subcommittee on NLRB (Pucinski, Chairman) of the House Committee on Education and Labor, 87th Cong. 1st Sess. (Comm. Print 1961), p. 1 ("The subcommittee finds that there is an unconscionable delay in the processing of unfair labor practice cases which renders final Labor Board decisions almost nugatory and futile").

⁶⁸ The median time to process an unfair labor practice case from charge to NLRB decision has dropped from 464 days in 1959 to 319 days in 1969. Address of NLRB Member John Fanning before Connecticut Bar Association, BNA Daily Labor Report No. 203 (October 19, 1970), D-1, at D-5. By not complying with the Board Order, the wrongdoer can gain another year or more. See Comment, "NLRB Remedial Orders: A Permissive Voice in Substantive Collective Bargaining?", 65 Northwestern L.Rev. 441, 443 (1970). For willful, flagrant violators, the average time span was found to be 555 days to Board decision and 1040 days to compliance with court decree. Wolkinson, "The Remedial Efficacy of NLRB Remedies in *Joy Silk* Cases," 55 Cornell L.Rev. 1, 11-12 (1969).

effects of delay in refusal to bargain cases—effects which could be substantially curbed, if not eliminated, by a compensatory remedy.

As noted above, the refusal to bargain results in a cost savings to the employer, a savings which is exacted from the employees' loss of bargaining rights. This economic advantage from the violation continues for as long as the employer is able to postpone his legal duty to bargain with the union. The conventional, prospective-only remedy attaches no consequences whatsoever to this delay (often deliberate) of the bargaining obligation. Rather, since the employer achieves increasing profits from the delay, Board processes provide an incentive to litigate any and every "defense" for as long as possible.⁶⁰ Delay also operates to undermine employee support for the union, with the result that the "... employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively." *Tiidee Products*, 138 U.S. App.D.C. 249, 255, 426 F.2d 1243, 1249 (1970). This additional debilitating effect of the refusal to bargain is amply documented by Professor Ross in his studies: *The Government as a Source of Union Power* (1965), pp. 201-202; *The Labor Law In Action* (1966), pp. 6, 16-17, 111-112.

The inevitable by-product of the profit-from-delay phenomenon is a growing number of Section 8(a)(5) cases

⁶⁰ As one commentator phrased it, a strong, determined employer "... can use delaying tactics as a formidable weapon in his anti-union drive. Because unionization would raise wages and loosen his economic grip upon his employees, such an employer finds it profitable to damage the union and to protract the damage as long as possible. Procedural slowness is thus the key to his success." Comment, "Toward Remedying Deliberate Unfair Practices under Section 8(a) of the NLRA: An Inquiry into the Pathology of the Wilful Violator", 17 UCLA L.Rev. 602, 613 (1970).

added to Board and court dockets. As this Court pointed out, "... the present posture of the Board encourages frivolous litigation not only before the Board, but in the reviewing courts." *Tiidee Products*, 138 U.S. App.D.C. 249, 255-256, 426 F.2d 1243, 1249-1250 (1970). Scholars have noted that "[m]any factors have contributed to the steep rise in section 8(a)(5) cases, but the principal cause has been the ineffectiveness of the Board's traditional remedies to curb and rectify abuses." Comment, "The *H. K. Porter* Experiment in Bargaining Remedies: A Study in Black and Wright," 56 Va.L.Rev. 530, 531 (1970).⁷⁰ Congress has also sought to alert the Board to the problem:

The subcommittee finds that a partial reason for the caseload, and hence the delay in unfair labor practice cases, lies in the inadequate remedies of the Labor Board. Labor Board orders constitute in many situations no more than a "slap on the wrist." They constitute, in the words of one witness, "a license fee for union busting." The subcommittee recommends that the Labor Board reconsider the problem of "remedies" with an eye to taking the profit out of unfair labor practices.⁷¹

Undeterred by this pointed criticism, the Board majority continues to encourage delay by entering its conventional, 34-year-old, 8(a)(5) remedy.

In *Ex-Cell-O*, the majority asserts that the answer lies not in effective remedies, but in "procedural reform", promising high priority in processing 8(a)(5) cases and "full resort" to the injunctive relief available under Sections

⁷⁰ See also, Ross, *The Labor Law in Action* (1966), p. 2: "The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act."

⁷¹ "Administration of the Labor-Management Relations Act by the NLRB", Subcommittee on NLRB (Pucinski, Chairman) of the House Committee on Education and Labor, 87th Cong. 1st Sess. (Comm. Print 1961).

10(j) and (e) (J.A. 240). The "high priority" promise is robbed of much meaning by the set of priorities for case handling required by the statute. Sections 10(l) and (m) of the Act establish seven categories of unfair labor practices that take precedence over Section 8(a)(5) and other cases. Seeking injunctions under Sections 10(j) and (e) of the Act is a more realistic approach, *if* the Board uses it. Section 10(j) injunctions are a valuable tool for 8(a)(5) violations, especially the willful, flagrant variety. See, Wolkinson, "The Remedial Efficacy of NLRB Remedies in *Joy Silk* Cases," 55 Cornell L.Rev. 1, 37-39, 42-43 (1969).⁷² However, there is reason to be skeptical of any promise of substantial relief under 10(j). In the first place, the Board has made similar promises before and then proceeded to use the 10(j) injunction procedure "at a snail's pace." Wolkinson, *supra*, at p. 37. Thus, the NLRB held out hope for expanded use of 10(j) injunctions in the early 1960's; and the number of 10(j) petitions filed went from 5 in fiscal 1960⁷³ to 16 in fiscal 1968.⁷⁴ There were 4,097 charges of 8(a)(5) violation in fiscal 1968.⁷⁵ In short, "[g]reater use of this [10(j)] remedy has been promised on occasion, but that promise has remained largely unfulfilled." Note, "A Survey of Labor Remedies," 54 Va.L.Rev. 38, 71 (1968). In addition, the courts have imposed rather rigorous standards of proof,⁷⁶ and the Board fails to obtain

⁷² See also, Bok, "The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act", 78 Harv. 38, 132 (1964).

⁷³ 25th NLRB Annual Report, p. 199. Four of the five petitions were filed against union violations. *Ibid*.

⁷⁴ 33rd NLRB Annual Report, p. 242. See also the chart in Wolkinson, *supra*, 55 Cornell L.Rev. at 38, n. 101.

⁷⁵ 33rd NLRB Annual Report, p. 203.

⁷⁶ *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967); *Minnesota Mining and Manufacturing Co. v. Meter*, 385 F.2d 265, 270-272 (8th Cir. 1967); *McLeod v. General Electric Co.*, 366 F.2d 847, 849-850 (2nd Cir. 1966).

an injunction or settlement in roughly one third of the cases it does initiate. See Wolkinson, *supra*, 55 Cornell L.Rev. 1, 38, n. 101 (1969). The Board's use of temporary relief under Section 10(e) is also limited,⁷⁷ and its win percentage probably less than that for 10(j) injunctions. See *N.L.R.B. v. Aerovox Corp.*, 389 F.2d 475, 477 (4th Cir. 1967); *N.L.R.B. v. Beverage-Air Co.*, 391 F.2d 255, 256 (4th Cir. 1968); *N.L.R.B. v. Sagamore Shirt Co.* (D.C. Cir., unreported order of February 1, 1968 in No. 21,369).

None of the procedural improvements really reach the heart of the problem—the employer's profit from delay. Until that incentive to litigate is removed, the Board's 10(j)-10(e) approach will have minimal success in coping with the growing number of willful violators using deliberate delaying tactics. In short, the injunction is a valid remedial device for 8(a)(5) violations when used to reinforce a compensatory remedy. Wolkinson, *supra*, 55 Cornell L.Rev. 1, 42-43 (1969). By itself, the 10(j)-10(e) approach is weak medicine.⁷⁸

C. The Board Fails to Coordinate the Policy of Encouraging Collective Bargaining with Other Statutory Policies.

As noted above, the Board majority in *Ex-Cell-O* acknowledged the employee losses and frustrations flowing from the 8(a)(5) violation. It then rejected an adequate remedy to safeguard those employee interests in favor of safeguarding the employer's procedural right of judicial review and his freedom of contract (J.A. 235-240). This is hardly coordination of the statutory policies. Indeed, the Board has turned the statute on its head: enforcement of the obli-

⁷⁷ Nine applications for 10(e) relief were filed in fiscal 1968. 33rd NLRB Annual Report, p. 242.

⁷⁸ The *Ex-Cell-O* majority admits that "current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate." (J.A. 234).

gation to bargain collectively, the "core of the Act,"⁷⁹ has been made subservient to procedural or contractual interests of the wrongdoing employer.

There is no right to endlessly litigate "sham" issues. The Board should not permit judicial review of frivolous defenses to override the employees' right to a meaningful enforcement of their bargaining right. *Tiidee Products*, 138 U.S. App.D.C. 249, 255-256, 426 F.2d 1243, 1249-1250 (1970). The Board's assertion that the blatant violation and absurd defense of the Company here cannot be distinguished from the genuine, good faith reasons that may exist for resorting to the Board and courts in other cases (J.A. 237) is patently untenable. The courts have made such distinctions;⁸⁰ and the Board is no less qualified to do so. In fact, the frivolous-debatable determination is closely akin to the "substantial and material factual issues" test the Board applies to post-election requests for hearings.⁸¹ And finally it should be noted that the "technical" refusal to bargain, committed solely to test a representation issue, plays "a relatively negligible role" in the total number of 8(a)(5) cases. Ross, *The Labor Law in Action* (1966), p. 55. At the very least, the Board should implement employee rights where there is no employer good faith pursuit of Board and court review, where such litigation is purposefully resorted to solely for its delay. A compensatory remedy in this situation does not single out "bad faith" employers for a "punitive" remedy.⁸² It merely

⁷⁹ *Tiidee Products*, 138 U.S.App.D.C. 249, 255, 426 F.2d 1243, 1249 (1970).

⁸⁰ *Tiidee Products*, 138 U.S.App.D.C. 249, 426 F.2d 1243 (1970); *United Steelworkers of America (Quality Rubber Mfg. Co.) v. N.L.R.B.*, —U.S.App.D.C. —, 430 F.2d 519 (1970); *N.L.R.B. v. Smith & Wesson*, 424 F.2d 1072 (1st Cir. 1970).

⁸¹ NLRB Rules and Regulations, Series 8, Section 102.69(c), 29 CFR § 102.69(c). See also *N.L.R.B. v. Joclin Mfg. Co.*, 314 F.2d 627, 631-632 (2nd Cir. 1963).

⁸² See St. Antoine, "A Touchstone for Labor Board Remedies", 14 Wayne L.Rev. 1039, 1042-1044 (1968).

takes into account the added dimension (almost a separate 8(a)(5)) to this type of refusal to bargain, namely, deliberate delay. Consideration for this extra facet of the violation clearly calls for some relief. This minimum application of the compensatory remedy has been upheld by this Court. See cases cited *supra* p. 24.

Although not involved in this proceeding, even good faith employer litigation should not be paid for by the employees whose collective bargaining rights have been violated to their economic detriment. An accommodation of the procedural rights of employers and the substantive rights of employees is appropriate for a coordinated implementation of statutory policies.⁸³ The honest, but erroneous, refusal to bargain has the same economic effects as the willful, flagrant violation. The employee losses in compensation and employer savings in labor costs are not diminished by the "good faith" reasons for violating the Act. It would seem highly inequitable to require the innocent employees to shoulder the entire economic burden when the employer's "debatable" defense is ultimately proven wrong. Indeed, "[i]t seems entirely fair that the employer, rather than the employees, should bear the risk of his [the employer's] mistake. This is no different from any other litigation in which losses may occur or accumulate because one party insists upon rights that turn out to be nonexistent." St. Antoine, "A Touchstone for Labor Board Remedies," 14 Wayne L.Rev. 1039, 1044 (1968). See also, Note, "An Assessment of the Proposed 'Make-Whole' Remedy in Refusal-to-Bargain Cases," 67 Mich. L.Rev. 374, 386-387 (1968).

⁸³ The concern evidenced for the employer's right to judicial review is to be contrasted with the apparent indifference to the very substantial problems unions have in obtaining court review of NLRB representation rulings against them. See Goldberg, "District Court Review of NLRB Representation Proceedings", 42 Indiana L.J. 455, 502-507 (1967). There is no way a union can get into court merely by refusing to comply with a Board representation decision.

The employer who in good faith seeks Board and court rulings on his defenses can take several steps to anticipate monetary liability for his refusal to bargain. For example, it has been suggested that employers set up a contingency reserve. St. Antoine, *supra*, 14 Wayne L.Rev. 1039, 1044 (1968). Another solution would be for an employer to commence a conditional type of bargaining, limited to the economic terms of employment, while taking his case to court. The employer could properly deal with the union on matters of wages, hours, fringe benefits, and the like, without recognizing the union as the legally authorized employee representative. His legal reservation should not preclude good faith bargaining on job conditions for employees during the time it takes to get a final court decree. If the court upholds the employer's position, he will then be free to take whatever action he wishes on any conditionally negotiated employment term. However, if the court finds a duty to bargain has arisen in the past, the employer's interim economic bargaining likely will have eliminated the basis for imposing a compensatory remedy.⁸⁴ So long as the employer does not recognize the union as the full, statutorily authorized, bargaining agent, there is nothing unlawful in such a temporary, conditional, economic arrangement.⁸⁵ It is in essence what the Board seeks to accomplish in petitions for temporary relief under Section 10(j) and 10(e). And, at times, employers and unions have worked out such conditional bargaining agreements on their own. If the Board wished to pursue this approach, it might devise some sort of "consent-to-conditional-bargaining" agreement. Those employers genuinely seeking court review would have no objection to entering into such an agreement; and those deliberately using review for delay

⁸⁴ Clearly, sham or surface bargaining would not suffice.

⁸⁵ See *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962). Cf. *Retail Clerks International Association v. Montgomery Ward & Co.*, 316 F.2d 754, 757 (7th Cir. 1963).

would properly be required to compensate their employees for the losses sustained as a result of that delay.

Petitioner also believes that the statutory policy of freedom of contract can and should be accommodated to a remedial implementation of employee rights. This policy is part of the overall definition of the duty to bargain set forth in Section 8(d).⁸⁶ The legislative history indicates that Congress meant to curb Board inferences of "bad faith" from an employer's unwillingness to make concessions or to agree to union proposals in negotiations. See H.R. Rept. No. 245, on H.R. 3020, I *Legis. Hist. of the LMRA* 292 (1947) at 310-312; Senate Rept. No. 105 on S. 1126, I *Legis. Hist. of the LMRA* 407 (1947) at 430; House Conf. Rept. No. 510, I *Legis. Hist. of the LMRA* 505 (1947) at 538. Thus, by its terms and its legislative history, Section 8(d) applies to the parties' negotiating conduct *after* bargaining begins. The right to disagree or to bargain "hard" arises once the employer has recognized his duty to bargain and begun negotiating. It is not a right to avoid bargaining or to erode the remedy for failing to do so. It would be anomalous if an employer could evade the consequences of breaching his duty to bargain by pleading a right exercisable only upon acceptance of that duty. Petitioner knows of no cases interpreting Section 8(d) in this manner; rather, the courts have upheld the employer's right not to agree only where he has recognized, and negotiated with, the union. See e.g. *H. K. Porter v. N.L.R.B.*, 397 U.S. 99 (1970); *N.L.R.B. v. American*

⁸⁶ For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

National Insurance Co., 343 U.S. 395 (1952); *Steelworkers v. N.L.R.B.*, — U.S. App.D.C. —, — F.2d —, 75 LRRM 2790 (December 4, 1970). In the present case, the Company will be perfectly free to propose or deny any contract term as it sees fit. The compensatory remedy for its past 5 years of refusing to bargain will in no way interfere with the Company's freedom to negotiate in the future.

The government properly abstains from interference with private negotiations in established bargaining relationships. But where there is no such relationship and the employer is using unlawful tactics to avoid its establishment, complete abstention is no longer appropriate. Our national labor policy is founded on two aspects of economic power: "We attempt to insulate employees from economic pressure affecting their decision whether or not to bargain collectively, but we build our scheme of collective bargaining on the foundation of economic power." Lesnick, "Establishment of Bargaining Rights without an NLRB Election," 65 Mich. L.Rev. 851, 867 (1967). The Company here has inverted that "dual regime." It has obliterated the employees' free selection of the Union with extensive economic threats, intimidation and discrimination, and then used the NLRB proceedings to corrode the employees' economic base for launching collective bargaining. The Board majority in effect condones this unlawful conduct by the ineffective remedial action required of the Company. Virtually no consequences are imposed on the Company's flagrant denial of employee rights and deliberate delay through litigation of frivolous defenses.⁸⁷ Petitioner finds it difficult to believe that the Board majority has "reasoned" itself into this distorted construction of the Act. Perhaps the majority was influenced by the commentators who argue that a compensatory remedy is too difficult to measure or administer. See, Baier, "Rights Under a Collective Bargaining

⁸⁷ Even the Notices of the violations fail to refer to the Company's willful delay of five years (J.A. 195-196, 207).

Non-Agreement: The Question of Monetary Compensation for a Refusal to Bargain," 47 Journal of Urban Law 253, 305-309 (1969); Note, "Monetary Compensation as a Remedy for Employer Refusal to Bargain," 56 Georgetown L.J. 474, 513-515 (1968); Comment, "Recent Developments in the Creation of Effective Remedies Under the National Labor Relations Act," 17 Buffalo L.Rev. 830, 839 (1968). In short, this may be a case of administrative timidity.⁸⁸

III. The Board Can Devise a Workable "Make-Whole" Remedy that Reasonably Approximates Employee Losses without Imposing Contract Terms.

It should first be noted that petitioner does not seek a compensatory remedy for spite or retribution against employers or for the harm to the union as an institution.⁸⁹ The Union wants only to provide a *lawful, peaceful* means of bringing employers into early compliance with the Act.

⁸⁸ "On the other side of the matter, however, lay what the [*Ex-Cell-O*] majority thought were insuperable legal and practical obstacles to embarking upon the type of remedy which the Trial Examiner in this case had recommended. . . . [A] majority of us concluded that we had no legal authority to impose this particular remedy and that there were serious practical problems which would lie in pursuing any such course." (emphasis supplied). Remarks of NLRB Chairman Edward Miller, Ninth Annual Corporate Counsel Institute of Northwestern University Law School, BNA Daily Labor Report No. 196 (October 8, 1970), D-1, at D-4.

⁸⁹ The Union has suffered damage from the refusal to bargain not only in respect to its status at Zinke's, but also in stiffer employer resistance to other organizing efforts resulting from awareness of Zinke's success in beating the Union in 1966 and avoiding any meaningful remedial order. The damage is tangibly represented in organizing expenses and lost dues (the Union has a policy of not collecting dues until a contract is signed). Petitioner does not specifically seek Court consideration of this aspect of the consequences of the violation. However, the Court may wish to direct the Board's attention to it on remand. See *Tiidee Products*, 138 U.S.App.D.C. 249, 257, 426 F.2d 1243, 1251 (1970).

The object is to encourage collective bargaining by removing the profit from 8(a)(5) violations. That objective is furthered by a compensatory remedy for the employee losses, measurable as costs to the employer, that result from the employer's unlawful denial of bargaining rights.

A compensatory remedy limited to items that can be identified as labor costs falls far short of a complete award of general damages. It would consist primarily of such things as lost wages, paid holidays and vacations, premium pay, and contributions to health, welfare and pension funds. It would not reimburse employees for the loss of the many other economic advantages of collective bargaining simply because there is, as yet, no way to translate them into employer costs. Thus, there will be no recompense for the denial of extra job security, seniority, a grievance procedure and arbitration, protection against contracting out, elimination of inequities in wages, job classifications or work schedules, and the like. Clearly, the proposed remedy does not represent "general damages," and does not come close to making the employees "whole." It merely seeks to remove the identifiable, measurable gain from the 8(a)(5) violation and thereby encourage an early, good faith performance of the bargaining obligation.

In devising this "make-whole" remedy, the NLRB need not presume that a bargaining agreement would in fact have been reached. All the Union asks is that the Board presume that the Company would have bargained in good faith as the law requires it to do. As a measure of what the Company has gained and the employees have lost by the Company's refusal to bargain, the Union suggests that the Board look to the Union's experience in good faith bargaining for first contracts with other employers.⁹⁰

⁹⁰ In part because good faith bargaining is the relevant base for computing the remedy, Petitioner contends that "bad faith" unilateral wage increases should not be used as offsets to the compensatory award. However, this and other technical aspects of administering the "make-whole" remedy can be squarely faced by the Board upon remand.

The Union was able to show in the present record that its bargaining with food store employers was conducted on a joint basis in the Beloit-Janesville area, and that newly organized employers, such as Zinke's, were always negotiated up and into the joint negotiations for uniform area-wide wage scales and other contract terms (J.A. 116-122, 124-127, 156). The Company failed to show any variation or special concessions from the prevailing area wage scale (J.A. 120-122, 124-127). The only variation among area employers was on time; occasionally it took four months to negotiate the first contract and sometimes an employer was given twelve months to "catch up" to the contract scale (J.A. 117, 127). In the instant case, given the Company's substantially lower wage rates and its ability to afford at least a 10-cent an hour unilateral increase (J.A. 57), the Union's prior experience in first contract bargaining establishes an extremely high probability that good faith bargaining with the Company would have produced the higher wages and benefits of the area contract.

Several formulas or approaches can be used to convert this experience into monetary awards for the employees. First, the Board could compute the difference between the median Company wage-benefit level and the median wage-benefit level in the Union's area-wide contract as of the date of the refusal to bargain—February 16, 1966. This cents-per-hour difference could then be awarded to the employees working in the unit according to their hours logged between violation and the start of good faith bargaining. Or the Board might compute a percentage factor, representing the median relative increase in earnings achieved in prior first contract negotiations. This percentage factor could then be applied to each employee's quarterly earnings⁹¹ during the compensatory period. Yet

⁹¹ The method of computing back pay by calendar quarters was adopted by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and approved in *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

another method would be to compute the lump sum difference between the Company's actual total labor costs and those required by the Union's area agreements. This lump sum for each quarter would be divided pro rata among the employees in the unit.⁹² This latter method has the advantage of reflecting the changes in wage-benefit levels appearing in subsequent area contracts. These formulas are presented not as definitive solutions for this Court's approval, but only as examples of workable approaches which the Board can consider on remand.

Admittedly, the "pattern" or "key" agreement type of bargaining presented here is an easy case for gauging the likely impact of collective bargaining.⁹³ This bargaining situation has strong, built-in pressures (from both employers and unions) to extend uniform economic terms of employment throughout the area or industry. Union concessions occur only in the "crisis or near crisis situations" where compliance with the pattern would jeopardize jobs in the unit. See Levinson, "Pattern Bargaining: A Case Study of the Automobile Workers," LXXIV Quarterly Journal of Economics 296, at 306-308, 315-317 (1960); Greenberg, "Deviations from Wage-Fringe Standards," 21 Industrial & Labor Relations Review 197, at 207-208 (1968). But, other experience-rating formulas can be used for other types of collective bargaining. A union might be able to point to a first contract experience at another plant of the same company which should be comparable to the

⁹² A "lump sum" approach is at times used in computing back pay for 8(a)(3) violations. See Note, "A Survey of Labor Remedies", 54 Va.L.Rev. 38, 75 (1968).

⁹³ This is a frequent format for bargaining in the retail food industry. "Retail food is distributed predominantly through chain stores, and here a form of pattern bargaining by areas seems to predominate." Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management* (1960), p. 613.

impact of bargaining at the newly organized plant.⁹⁴ The union might also compile figures on its recent first bargaining situations or other data relevant to the likely effect its bargaining will have in a newly organized establishment. In addition, there are many public as well as private sources of bargaining data that can be explored by the Board in adversary or in rule making proceedings. See dissenting Members McCulloch and Brown in *Ex-Cell-O* (J.A. 265-267).

Any bargaining experience approach will, of course, include the union's failures along with its successes. Thus, if a union is weak or if its employers are hostile and intransigent, there may not be a first contract with higher wage-benefit levels. Such experiences will register zero in the formula and thus pull down the pluses achieved in other first contract situations. And, if new employers are already paying the union scale, the formula can recognize that there is no economic differential to compensate for. The experience rating approach thus affords the employees neither the maximum union impact in bargaining, nor the bare minimum. It merely places the employees and the employer in the average or median⁹⁵ level of benefits the union has experienced in the industry and area involved. The experience rating formula thus provides a sound method of approximating the likely economic impact of collective bargaining.⁹⁶

⁹⁴ This was one formula proposed by the UAW in the *Ex-Cell-O* case, 185 NLRB No. 20, TXD 13-14. It is analogous to the "comparable" or "representative" employee approach sometimes used to compute a discriminatee's back pay. See *Carpenters Union Local 180*, 175 NLRB No. 150, TXD 3, 6 (1969), enf'd. — F.2d —, 75 LRRM 2560 (9th Cir. October 22, 1970). See also Note, "A Survey of Labor Remedies", 54 Va.L.Rev. 38, 74-75 (1968).

⁹⁵ The question of whether to use a weighted average or a median figure can be left for Board consideration on remand.

⁹⁶ The experience rating approach is not exactly novel. It is the basis for the insurance industry. A proximate example is the unemployment

The only variable left out of the experience rating formula is that of the particular employer refusing to bargain. This "deficiency" is entirely the employer's own doing and within his power to eradicate by commencing bargaining (perhaps only on a limited, conditional basis, *supra* pp. 43-44). But, since he unlawfully refused to bargain, the employer is in no position to complain about the "uncertainty" or "speculative" nature of the formula. The problems having been created by the employer, they "... should be resolved against the employer." *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 572-573 (5th Cir. 1966). As the Board recently pointed out, it is already dealing with remedial problems which require it "... to adopt formulas which result in backpay determinations that are close approximations because no better basis exists for determining the exact amounts due. * * * [In order to prevent the employer from profiting] at the expense of the employees whom it injured, . . . [s]ome measure of backpay is therefore required in order to effectuate the purposes of the Act." *The Buncher Co.*, 164 NLRB 340, 341 (1967), *enf'd.* 405 F.2d 787 (3rd Cir. 1968). See also, *F. W. Woolworth Co. v. N.L.R.B.*, 121 F.2d 658, 663 (2nd Cir. 1941). These cases do no more than recognize the long-standing equitable rule that a wrongdoer does not go free simply because his wrong has prevented exact measurement of its harm. See *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264-266 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-566 (1931); *Anderson v. Mt. Clemons Pottery Co.*, 328 U.S. 680, 688 (1946); *Zenith Radio Corp. v. Hazeltine Research, Inc.*,

experience rating used by most states to reduce the individual employer's contributions for unemployment compensation. See Teple & Nowacek, "Experience Rating: Its Objectives, Problems and Economic Implications", 8 Vanderbilt L.Rev. 376 (1955). And, the NLRB itself relies on a type of experience rating when it projects a discriminatee's prior earnings record into the back pay period. See Note, "A Survey of Labor Remedies", 54 Va.L.Rev. 38, 74-77 (1968).

395 U.S. 100, 123-124 (1969); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 261-262 (1916). Thus, as the Trial Examiner recognized (J.A. 185-187), the law proceeds on the basis of the probability of loss and approximation of the amount of loss. To require certainty in the present circumstances is to reward the Company for its flagrant destruction of employee rights.

While precluded from attacking a formula based on the Union's experience in initial bargaining, the Company could be given the opportunity to establish grounds for modifying the formula's application to it. In a supplementary hearing, the Company could attempt to show that it is financially pressed, impervious to strikes, an extremely "hard" bargainer, or in other ways unlike the typical bargaining situation experienced by the Union. As in back pay proceedings, the Company would have the burden of proving such mitigating circumstances. See e.g. *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). Petitioner submits that this permits a reasonable approximation of the employee losses (Company gains) without foreclosing the Company's proof that it is factually atypical.

The approach outlined above for the Section 8(a)(5) "make-whole" remedy does not require calculations any more complex than those for the Section 8(a)(3) back pay remedy.⁹⁷ To be sure there are extra problems in computing any "make-whole" award over the long compensatory period involved in the present case. However, the same problems occur on occasion in back pay cases, and the Board

⁹⁷ Counsel apologize for going into so much detail with respect to the implementation of the 8(a)(5) compensatory remedy. We are trying to persuade the Board as well as the Court that this is a sound, workable remedy. We are apprehensive about winning a legal argument and losing the ultimate remedy to "administrative considerations" or "the entire record herein."

willingly accepts the challenge of resolving them. See e.g. *J. H. Rutter-Rex Mfg. Co.*, 158 NLRB 1414 (1966), *affirmed* 396 U.S. 258 (1969); *Cone Brothers Contracting Co.*, 158 NLRB 186, 221-229 (1966); *Rice Lake Creamery Co.*, 151 NLRB 1113 (1965), *enf'd. in part*, 124 U.S. App.D.C. 355, 365 F.2d 888 (1966). In any event, the number of complex, bitterly fought 8(a)(5) awards can be expected to be relatively small. As with the back pay award, the very existence of an 8(a)(5) compensatory remedy should foster settlement and early compliance with the Act. Out of the hundreds of 8(a)(3) violations found, there are few that require a back pay hearing to compute the remedial award. Thus, in fiscal 1968, there were only 42 back pay hearings initiated. 33rd NLRB Annual Report, p. 204. It would be very surprising if the 8(a)(5) awards produced any greater volume of litigation. Indeed, the very profit-denying nature of the remedy encourages compliance, not litigation.

It should be evident by now that the proposed compensatory remedy is not based on a "presumed" contract and does not require adherence to any government-imposed terms of employment. The remedy merely approximates the typical results experienced in this Union's initial bargaining, and puts the burden on the Company to show how that experience is not applicable to it. This approach provides a fairly close measure of what bargaining with this Company would have produced and thus removes the profit from its unlawful refusal to bargain. As a measure of bargaining impact, the remedy does rely primarily on collective bargaining agreements as evidence of the union's experience. But this evidentiary use of contracts is a far cry from imposing the terms of a specific contract as presumed by the Board majority (J.A. 238 ^). There is a clear and valid distinction between enl. ^ a set of promised future performances (a binding ^ tract) and looking to existing contracts as a source of ba. ^ining data (remedial facts). The Board majority ignores contracts as the principal

measure of bargaining reality out of a misplaced concern for freedom of contract. It has taken a legal right to reach no agreement and elevated it to a conclusive factual presumption that bargaining never produces agreement.

The Board would be the first to admit that "[t]he Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 236 (1938). The duty to bargain in good faith, defined in Section 8(d) of the Act, connotes a willingness to reach agreement. See e.g. *N.L.R.B. v. Reed & Prince Mfg. Co.*, 118 F.2d 874, 885 (1st Cir. 1941); *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, 154-155 (1956), Justice Frankfurter concurring in part. And yet, for the *Ex-Cell-O* majority, negotiated agreements do not exist as a source of remedial facts; to recognize their existence would contravene Section 8(d). The net result is that a union is encouraged to negotiate agreements, but is precluded from asking that they be recognized as a part of reality. For a union faced with an employer who refuses to negotiate, Section 8(d) has become a frustrating circle. The Board has never applied such reasoning to other cases. It has uniformly looked to contracts for a measure of the economic consequences of an 8(a)(5) unilateral change⁹⁸ or the level of job benefits a returning striker is entitled to receive for "full" reinstatement.⁹⁹ In short, there is no merit to the argument that use of contracts as a measure of bargaining experience is barred by Section 8(d) of the Act.

The full implications of the remedy on the conduct of bargaining in the future are not now known. But petitioner believes the overall effect will be favorable. The Union is unwilling to take the cynical view that the remedy will

⁹⁸ See cases cited in footnotes 45 and 49, *supra*.

⁹⁹ See e.g. *Ace Tank and Heater Co.*, 167 NLRB 663, 664-665 (1967).

merely shift employer intransigence into other forms such as "pro forma" or surface bargaining. Baier, "Rights Under a Collective Bargaining Non-Agreement: The Question of Monetary Compensation for a Refusal to Bargain", 47 *Journal of Urban Law* 253, 285-286, 298 (1969). It has already been noted that employers are acutely conscious of costs in deciding whether or not to bargain with the union. See *supra* p. 34. By removing cost savings as a factor in the decision, the 8(a)(5) remedy will focus employer attention on the legal considerations. When the law does require recognition and bargaining, employers will be more likely to comply without further resistance and prolonged litigation. The remedy will be most effective in reducing the number of willful, flagrant and indefensible denials of bargaining rights. "A bargaining order alone is ineffective because . . . an employer's willingness to abide by the law depends on the costs involved in violating the law relative to the costs of compliance. By eliminating the profit that the *Joy Silk* employer accrues from his law-breaking, the compensatory remedy would significantly increase the relative cost of his anti-union campaign. Under such circumstances many of the most inveterate anti-union employers might be dissuaded from violating their obligation to bargain collectively." Wolkinson, "The Remedial Efficacy of NLRB Remedies in *Joy Silk* Cases", 55 *Cornell L. Rev.* 1, 41 (1969).

The 8(a)(5) remedy should also promote a healthier labor relations atmosphere at the bargaining table. It should encourage first-time bargainers to stay well on the side of "good faith" tactics in order to avoid the imposition of the remedy. The compensatory remedy will not necessarily create a higher "floor" for union demands in initial negotiations. The awards will be made to employees in lump sums, and not stated as a particular hourly rate. In addition, a union might have to concede that the compensatory award has some relevance to the employer's

present ability to pay increased benefits. But, even assuming a "floor" was established, "... the NLRB is faced with a policy choice between awarding *no* damages where there has clearly been a violation of the NLRA by the employer or providing a remedy which *theoretically* may prejudice subsequent employer interests. As was true with the speculative remedy argument, the equities clearly favor granting the remedy." Note, "An Assessment of the Proposed 'Make-Whole' Remedy in Refusal-to-Bargain Cases", 67 Mich. L. Rev. 374, 389 (1968). Thus, a compensatory remedy will not only repair the economic harm inflicted on a particular group of employees, but also do much to promote respect for the Act and healthier labor relations.

CONCLUSION

"In the evolution of the law of remedies some things are bound to happen for the 'first time'." *International Brotherhood of Operative Potters v. N.L.R.B.*, 116 U.S.App.D.C. 35, 39, 320 F.2d 757, 761 (1963). The "first time" for this 8(a)(5) remedy is long overdue. The Union does not accept the "... view of the NLRB as a tired, perhaps politically motivated, vestige of the New Deal."¹⁰⁰ The Union believes that the Board has the "administrative resourcefulness"¹⁰¹ to revise its remedies to implement more fully the substantive guarantees of the Act. It should be remembered that right and remedy are two sides of a legal whole. If no remedial consequences are attached to a denial of a "right", there is no legal right at all. The consequences the Board has imposed on this Company's willful violation and deliberate delay are so minimal as to negate the Act's "core" right to bargain collectively. In this organizing campaign, the Union told the employees that they "... had a right by law to organize in a store, [and] were protected by law"

¹⁰⁰ Bernstein, "Nudging and Shoving All Parties to a Jurisdictional Dispute into Arbitration", 78 Harv.L.Rev. 784, 789 (1965).

¹⁰¹ *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198 (1941).

(J.A. 84). The Union cannot in good faith make that statement now.

The present case is not an isolated example of the Act run amok. Such total frustration of the statutory policies happens all too often. Employers are aware of this. Should the Board fail to provide an effective 8(a)(5) remedy, the growing defiance of the Act will continue. Something must be done to curtail the use of willful violation and deliberate delay as an employer tactic to defeat lawful organizing activity. Left to cope with this tactic on their own, unions may feel it necessary to rely more heavily on economic self-help to secure bargaining rights. But the Act was meant to provide a legal alternative to industrial strife. Petitioner submits that it is now time to reverse the backwards trend towards industrial strife and to rebuild and reinvigorate the Act's peaceful solution—collective bargaining.

The Court should remand the case to the Board with instructions to devise an effective compensatory remedy.

Respectfully submitted,

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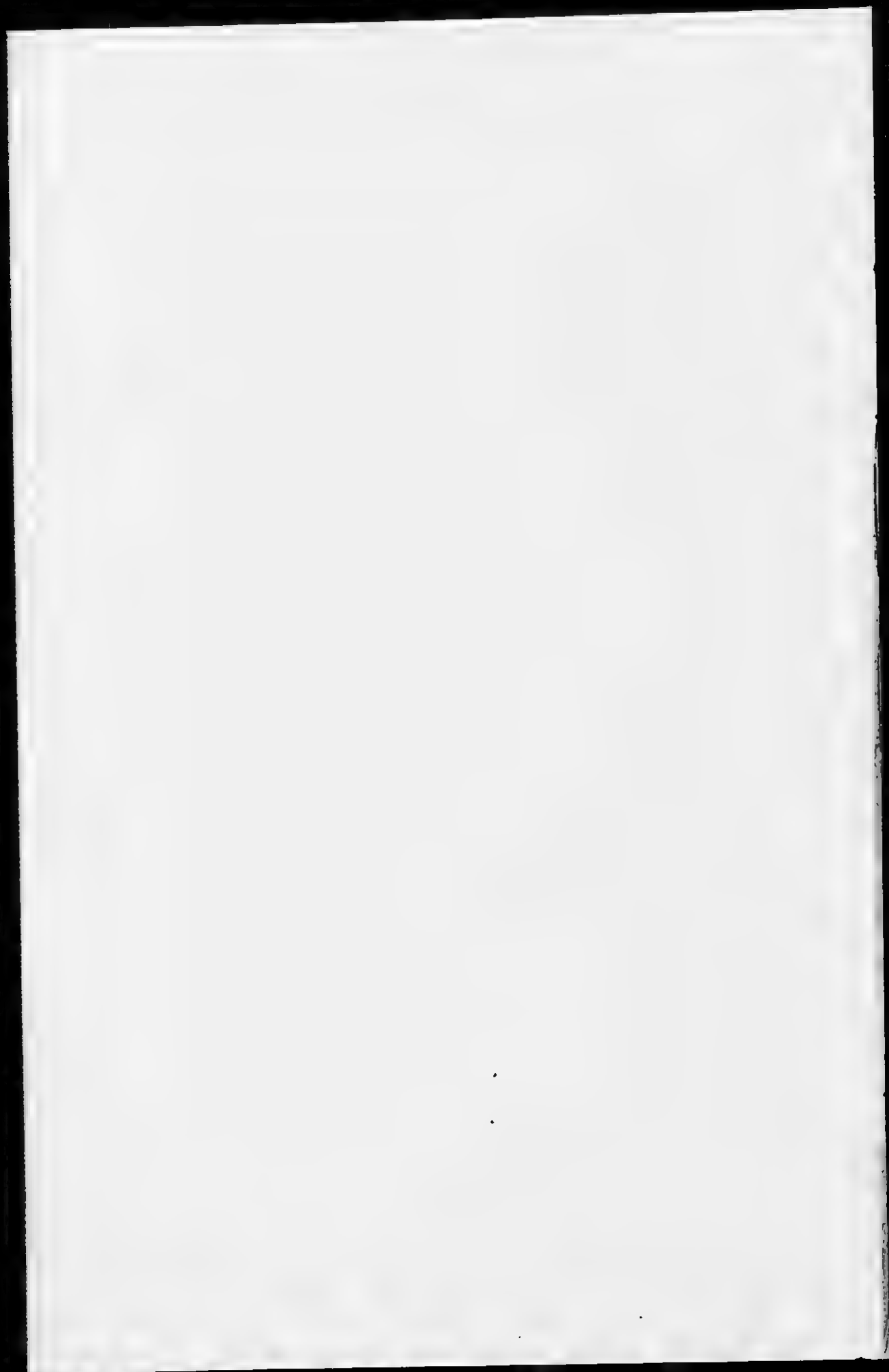
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**Text of Labor Management Relations Act, 1947, as Amended
by Public Law 86-257, 1959***

[Public Law 101—80th Congress]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining

*Section 201(d) and (e) of the Labor-Management Reporting and Disclosure Act of 1959 which repealed Section 9(f), (g), and (h) of the Labor Management Relations Act, 1947, and Section 503 amending Section 302(a), (b), and (c) of the Labor Management Relations Act, 1947, took effect upon enactment of Public Law 86-257, September 14, 1959. As to the other amendments of the Labor Management Relations Act, 1947, Section 707 of the Labor-Management Reporting and Disclosure Act provides:

The amendments made by this title shall take effect sixty days after the date of the enactment of this Act and no provision of this title shall be deemed to make an unfair labor practice, any act which is performed prior to such effective date which did not constitute an unfair labor practice prior thereto.

lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

- (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction

and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

NATIONAL LABOR RELATIONS BOARD

Sec. 3. (a) The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He

shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment *sine die* of the session of the Senate in which such nomination was submitted.

SEC. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of \$12,000* a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected

*Pursuant to Public Law 90-206, 90th Congress, 81 Stat. 644, approved December 16, 1967, and in accordance with Section 225(f)(11) thereof, effective in 1969, the salary of the Chairman of the Board shall be \$40,000 per year and the salaries of the General Counsel and each Board member shall be \$38,000 per year.

by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(c) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (c) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (c) and section 8(b)(4) (B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, member-

ship in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).*

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of

*Section 8(f) is inserted in the Act by subsection (a) of Section 705 of Public Law 86-257. Section 705(b) provides:

Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope.

Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(c) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like char-

acter in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(c) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like char-

acter in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organizations a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the

evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3)*

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

*Section 11(3) is repealed by Sec. 234, Public Law 91-452, 91st Congress, S. 30, 84 Stat. 926, October 15, 1970. See Title 18, U.S.C. Sec. 6001, et seq.

SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

SEC. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U.S.C., title 11, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 17. This Act may be cited as the "National Labor Relations Act."

SEC. 18. No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 9(f), (g), or (h) of the aforesaid Act prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 9(f), (g), or (h) of the aforesaid Act prior to November 7, 1947: *Provided*, That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment: *Provided, however*, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10(e) or (f) and which have become final.

EFFECTIVE DATE OF CERTAIN CHANGES*

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act

*The effective date referred to in Sections 102, 103, and 104 is August 22, 1947. For effective dates of 1959 amendments, see footnote on first page of this text.

which did not constitute an unfair labor practice prior thereto, and the provisions of section 8(a)(3) and section 8(b)(2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8(3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

SEC. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service," except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service

shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of \$12,000* per annum. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor," approved March 4, 1913 (U.S.C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF THE SERVICE

Sec. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication

*Pursuant to Public Law 90-206, 90th Congress, 81 Stat. 644, approved December 16, 1967, and in accordance with Sec. 225(f)(11) thereof, effective in 1969, the salary of the Director shall be \$40,000 per year.

with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

SEC. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

SEC. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of \$25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communi-

cation among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of \$50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U.S.C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board

of inquiry shall report to the President the current position of the parties and the efforts which has been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

COMPILATION OF COLLECTIVE-BARGAINING AGREEMENTS, ETC.

SEC. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective-bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

EXEMPTION OF RAILWAY LABOR ACT

SEC. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing;

or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or the connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees,

or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training program: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice:

Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.*

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

RESTRICTION ON POLITICAL CONTRIBUTIONS

SEC. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U.S.C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any

*Section 302(c)(7) has been added by Public Law 91-86, 91st Congress, S. 2068, 83 Stat. 133, approved October 14, 1969.

primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

TITLE IV

CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

* * * * *

TITLE V

DEFINITIONS

SEC. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce," "labor disputes," "employer," "employee," "labor organization," "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

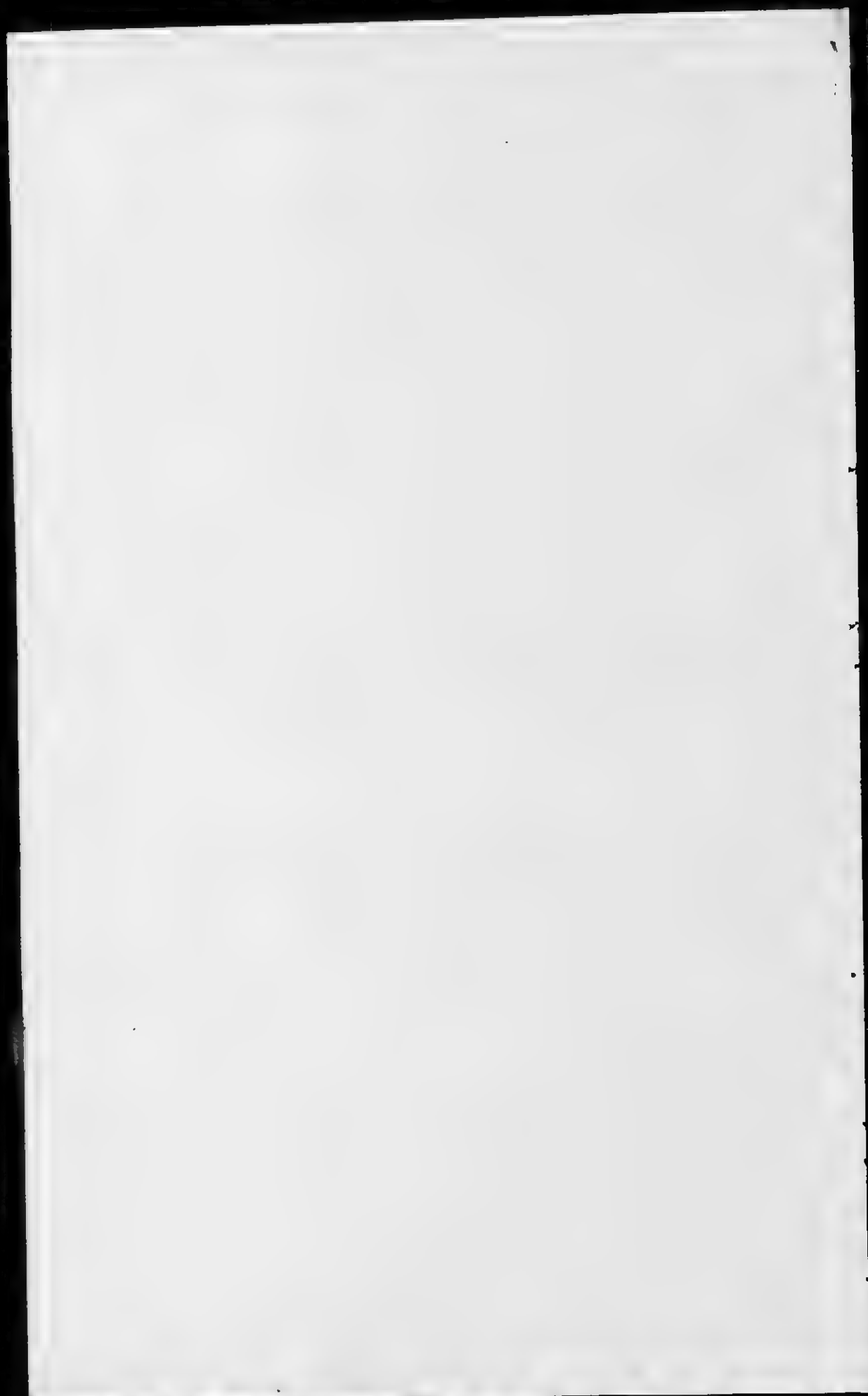
SAVING PROVISION

SEC. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

SEPARABILITY

SEC. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

U.S. GOVERNMENT PRINTING OFFICE: 1945 O-752-030



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,704

RETAIL CLERKS UNION, LOCAL 1401, RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*
and

ZINKE'S FOODS, INC., *Intervenor.*

No. 71-1082

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
v.

ZINKE'S FOODS, INC., *Respondent,*
and

RETAIL CLERKS UNION, LOCAL 1401, RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO, *Intervenor.*

On Petition for Review and Application for Enforcement
of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 19 1971

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,704

RETAIL CLERKS UNION, LOCAL 1401, RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO,
v. *Petitioner,*
NATIONAL LABOR RELATIONS BOARD,
and *Respondent,*
ZINKE'S FOODS, INC.,
Intervenor.

No. 71-1082

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner,*
ZINKE'S FOODS, INC.,
and *Respondent,*
RETAIL CLERKS UNION, LOCAL 1401, RETAIL CLERKS
INTERNATIONAL ASSOCIATION, AFL-CIO,
Intervenor.

On Petition for Review and Application for Enforcement
of an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights, in violation

of Section 8(a)(1) of the Act, and constructively discharged employee Kallas because of his union activities, in violation of Section 8(a)(3) and (1) of the Act.

2. Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act and directed the Company to recognize and bargain with the Union.

3. Whether the Board properly denied the Union's request for a "compensatory damages" remedy.

In accordance with Rule 8(d) of the General Rules of this Court, the Board states that this case is before the Court for the first time on its merits.

REFERENCES TO RULINGS

Case No. 71-1082 is before the Court upon application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order issued against Zinke's Foods, Inc. (hereinafter "the Company") on October 7, 1970. No. 24,704 is before the Court upon petition of the Union¹ to review that portion of the Board's decision which denied certain remedial measures the Union deemed appropriate. The cases have been consolidated for the purposes of appendix, briefs, and argument. The Board's Decision and Order is reported at 185 NLRB No. 109 (A. 203-207).² This Court has jurisdiction under Section 10(e) and (f) of the Act.

¹ Retail Clerks Union, Local 1401, Retail Clerks International Association, AFL-CIO.

² "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

A. Initial organizational activity

Around February 9, 1966,³ Company employee Edward Kallas spoke with Union business representative William Moreth about the possibility of starting an organizational drive among the Company's employees. When Kallas indicated that he was interested, the two of them went to employee Doris Saladino's home, where Moreth further explained Union organizational procedures and gave Kallas and Saladino authorization cards for distribution to fellow employees (A. 170; 83-84).

About February 11, a meeting was held at a local drive-in to explain the purposes of the Union to the Company's employees. Several employees signed authorization cards at that meeting, which Kallas collected (A. 85).

On February 14, after having obtained authorization cards from a majority of the employees, the Union sent a letter to the Company requesting recognition for a unit consisting, with certain exclusions, of all employees in the Company's Beloit store (A. 159; 60-61, 86, 140, 149-153).⁴ The letter also requested a meeting to "negotiate" the terms of a contract (A. 140). By letter of February 16, the Company refused the Union's request for recognition (A. 160; 154). The events found to have violated Section 8(a)(1) and (3) occurred after receipt of the Union's recognition request.

³ All dates hereinafter are in 1966, unless otherwise specified.

⁴ The Company is engaged in the retail sale of grocery and related products. The only store involved in this proceeding is the one located in Beloit, Wisconsin (A. 158).

B. The Company's preelection antiunion campaign

On February 19, Tom Kozel, the manager of the Company's Beloit store, entered the produce department and asked Kallas if he had been "contacted by the Union." Kallas replied that he had and Kozel then asked him whether he was "trying to get others to sign union cards." Kallas replied that he was not, that the union representative was organizing the Union. Kozel then told Kallas that it was a "dirty, rotten trick to pull on me after I hired you back",⁵ and added, "I take it you're . . . doing this to spite me. If the Union comes in, the store will have to close, we can't afford it. The decision in the future will be up to me" (A. 163-164; 87-89).

On February 21, the Union filed a petition for a representation election. Thereafter, the parties executed a Stipulation for Certification Upon Consent Election, which was approved by the Regional Director on March 4; the election was scheduled for March 16 (A. 160; 4-6).

Around the last week in February, employee Saladino was asked by Kozel if she would make out a list of employees in the grocery department for purposes of the election. Kozel proceeded to put a check by the names which she was supposed to copy. When he came to Kallas' name, he called him an s.o.b. and remarked, in effect, that he had given Kallas his job back in good faith and did not think he would have pulled something like that on him (A. 164; 135-137).

⁵ Kallas had been employed by the Company in mid-October 1964. On January 23, 1966, he quit the Company when a fellow employee reported that Kozel said that he was the worst produce man he had ever had. After working for one week at another market, Kallas, on January 28, called Kozel to discuss the matter further. Kozel asked him if he wanted to come back and Kallas replied in the affirmative. Kallas reported to work for the Company that same day (A. 169-170; 78-79, 82-83).

Around the beginning of March, Kozel told Richard Barreau, a 17-year-old employee (A. 67), that if the Union came in some of the employees under 18 years of age would be fired and that the job of stocking the shelves would be done by adults at night (A. 164; 70-71).

On March 11, Kozel approached Kallas in the storage room and asked him if he was "talking to the boys about the Union in the store." Kallas replied that he was not and Kozel said, "I don't care what you do away from the store, but not in the store, okay?" Kallas replied, "Okay" (A. 164; 95).

Later that afternoon, Kozel approached Kallas in the Company's break room and asked why he was there at that time and also why he had been there earlier in the day. Kallas replied that he was on his break and that he was on his lunch hour earlier. Kozel replied "oh," and left the room. About half an hour later, Kozel came to the produce display rack and began complaining about the manner in which the produce was displayed. He then thrust a bunch of broccoli toward Kallas and said, "Take this home and eat it, it's not fit for people." Kallas backed away but Kozel persisted in pushing it at him. Kozel finally threw it into a garbage can and left (A. 171-172; 93-94, 105-106).

Still later that day, Kozel came into the produce department and, in the presence of employees Haime and Schlott, told Kallas that "Sometimes I think we got too much help around here." Kallas did not reply and Kozel repeated the statement several times to employee Haime, again with no response. Kallas believed, on the basis of these statements, that Kozel intended to send someone home that night and volunteered to leave work in order to allow another worker to continue working. Kozel agreed, but when Kallas came in the next day, Kozel asked him why he had not worked the previous night. Kallas replied that Kozel had agreed to his

going home and offered to have employee Haime verify it, but Kozel said he did not care what Haime heard and told Kallas, "Who do you think you are, that you can set your own time. Ed Kallas, I could fire you for this." Kozel then suggested that the reason Kallas had gone home was that he was ashamed of what he had done to the store and said, "Who do you think you are, some kind of angel? Who are you trying to protect? You'll have to live with this the rest of your life." Kallas replied that his conscience was clear (A. 171-172; 94-95).

The next day, March 12, Kozel engaged in conversation with employee Bunker in which Kozel said, in response to Bunker's question, that a union victory might result in a cutting of working hours or even a sale of the store (A. 164; 132).

On Monday, March 14, Kozel spoke to employee Saladino and told her, in response to a question, that the Company could not afford "to go union" and that some of the employees would be laid off if the Union came in (A. 164; 134-135).

On March 15, Kozel told employee Haime "that the store wasn't making that much money and they didn't feel that . . . if we got a union that we would be able to have these increases and benefits." He also said that "there possibly could be a reduction in [working] hours" if the Union came in (A. 164; 107-108).

The Company also sent employees three letters, dated March 5, 11, and 12, in which it discussed the upcoming union election (A. 165-167; 141-147). The March 5 letter stated, *inter alia*, that the business would only be profitable if the employees were happy and satisfied. The letter continued:

This atmosphere has always been, and always will continue to be, the relationship that we attempt to maintain

with each of you. . . . We can attain that goal only if we have your cooperation and support. The presence of a union means only that we have to deal through a third party, an outsider, who has no interest in our welfare and therefore your job security.

The letter also stated that, despite Union promises, "A union does not give employees security in their jobs. Job security depends upon . . . our customers shopping and continuing to buy at our store . . . If the cost . . . becomes too high and we are forced to raise prices, then we lose customers. If we lose customers we are forced to cut the cost of operation" (A. 165, 166; 141-142).

The March 11 letter stated, in part:

[A] union often brings with it an atmosphere of discord, distrust and dissension. This is because the union leader tries [sic] to justify the taking of money, in the form of union dues and special assessments. To do this, the union leader looks for something to argue about. This, of course, leads either to strikes or high costs and higher prices which our customers will refuse to pay. When that happens, we will lose our only source of security, our customer.

The letter went on:

You have the right to vote for the Union if you want to. If a majority of the employees who vote want to drive a wedge between you and your management and create the dog-eat-dog atmosphere which union bargaining usually involves, we will be bound by your decision.

* * *

We do not want a union. You and we have every reason to work together cooperatively in joint self-

interest. A union cannot grow in an atmosphere of mutual confidence. Strife and distrust are more to a union's liking. If you agree with our position, vote "NO" in the NLRB election on March 16, 1966.

(A. 165-166, 167; 143-144).

The Company's March 12 letter quoted an article from the Wall Street Journal headlined "Non-Union Wages Outgain Union Pay, Federal Officials Find," and added:

As we stated in a previous letter — "A union can only promise; it cannot pay a wage increase. It is an employer who makes wage increases. . . . If an employer is to have satisfied employees, he must pay the wage rate which prevails for that type of work in the community in which the business is located."

(A. 167; 145-146).

C. The election and its aftermath

The election was conducted on March 16 and resulted in 10 votes for the Union and 15 votes against. On March 21, the Union filed objections to conduct affecting the results of the election (A. 160-161; 10-13).⁶

On April 7, employee Kallas informed Store Manager Otto Stahl that he was quitting that day (A. 172-173; 98). He told Stahl that he was in ill health because of the pressure placed upon him because of his union

⁶ A hearing on the Union's objections was consolidated with the instant unfair labor practice case (A. 162; 17-24).

activities⁷ and told him that he could not take it any longer, adding that "it was no longer worthwhile fighting to keep my job" (A. 172-173; 98).

On June 4, 1966, the Company gave 10-cent per hour wage increases to fifteen employees, one of whom received an additional 10-cent increase on either June 25 or July 2 (A. 179; 57).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board concluded that the Company violated Section 8(a)(1) of the Act by coercively interrogating, threatening, and promising benefits to employees in an attempt to undermine the Union. The Board further found that the Company violated Section 8(a)(1) of the Act by prohibiting employees from speaking about the Union at any time and in any portion of its premises and violated Section 8(a)(3) and (1) of the Act by constructively discharging employee Kallas because of his union activities. Finally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by unlawfully refusing to bargain with the Union, and that it further violated Section 8(a)(5) and (1) of the Act by granting unilateral wage increases (A. 205-206).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from "in any other manner" interfering with its employees' Section 7 rights. Affirmatively, the Board's order requires the Company to recognize and bargain with the Union upon request, to make Edward Kallas whole for any loss of wages suffered by reason of the Company's discrimination, and to post the usual notices (A. 191-196; 206-207).

⁷ As shown *supra*, pp. 4-6, Manager Kozel was very critical of Kallas. This criticism continued after the election (A. 171-173; 96-97, 106-107).

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ARGUMENT

- I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN THE EXERCISE OF THEIR SECTION 7 RIGHTS, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT, AND CONSTRUCTIVELY DISCHARGED EMPLOYEE KALLAS BECAUSE OF HIS UNION ACTIVITIES, IN VIOLATION OF SECTION 8(a)(3) AND (1) OF THE ACT

The Company did not seriously dispute, and did not file exceptions to the Trial Examiner's finding, that the Company violated Section 8(a)(1) of the Act by coercively interrogating its employees; threatening plant closure, discharge, loss of jobs and reduction of hours if the Union came in; and prohibiting employees from speaking about the Union at any time and in any portion of its premises. The Company also did not file exceptions to the Trial Examiner's finding that it violated Section 8(a)(3) and (1) of the Act by discriminatorily subjecting employee Kallas to such constant and unwarranted fault finding that he was compelled to leave the Company's employ (A. 197-202). Accordingly, under Section 10(e) of the Act, the Company is precluded from raising any defenses in this regard, and the Board's Section 8(a)(1) and (3) findings in this regard are entitled to affirmance on review.⁸

Moreover, as shown in the Counterstatement, the Company sent its employees three letters dated March 5, 11, and 12, in which it warned

⁸ See, *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 255-256 (1943); *Glaziers' Local 558 v. N.L.R.B.*, 132 U.S. App. D.C. 394, 399-400, 408 F.2d 197, 202-203 (1969); *Dallas General Drivers, Local 745 v. N.L.R.B. (Farmers Cooperative Gin Ass'n)*, 128 U.S. App. D.C. 383, 385, 389 F.2d 553, 555 (1968); *Carpenters District Council of Detroit v. N.L.R.B.*, 109 U.S. App. D.C. 209, 213-214, 285 F.2d 289, 293-294 (1960).

employees that selection of the Union as their collective bargaining agent would cause unspecified strife and destroy the usual friendly relationship between the parties (letters of March 5 and 11); would eventually result in the loss of jobs (letters of March 5 and 11); and would be futile for purposes of securing additional wages (letter of March 12). While an employer is free to make predictions as to the effects unionization will have on it, such statements must be based on objective facts and must be carefully phrased to convey an employer's belief as to demonstrably probable consequences. *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969), citing *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 274, n. 20 (1965). Statements must also be viewed in light of the "economic dependence of the employees on their employers and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *N.L.R.B. v. Gissel Packing Co., Inc.*, *supra*, 395 U.S. at 617. In view of the Company's pervasive antiunion campaign detailed above, the suggestion in the letters that the presence of a union would jeopardize jobs and worsen working conditions was, we submit, plainly coercive. *Food Store Employees, Local 347 v. N.L.R.B.*, 135 U.S. App. D.C. 341, 344, 418 F.2d 1177, 1180 (1969); *U.A.W. v. N.L.R.B. (Preston Products Co.)*, 129 U.S. App. D.C. 196, 201, 392 F.2d 801, 806 (1967), cert. denied, 392 U.S. 906; *General Teamsters, etc., Local 782 v. N.L.R.B. (Blue Cab Co.)*, 126 U.S. App. D.C. 1, 2-3, 373 F.2d 661, 662-663 (1967), cert. denied, 389 U.S. 837. And the implication in the Company's letters that the employees would receive better wages without a union amounted to an implied promise of benefit and was a further violation of Section 8(a)(1) of the Act. *U.A.W. v. N.L.R.B. (Preston Products Co.)*, *supra*, 129 U.S. App. D.C. at 201, 392 F.2d at 806; *Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B. (Hamburg Shirt Corp)*, 125 U.S. App. D.C. 275, 278, 371 F.2d 740, 743 (1966).

II. THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT AND DIRECTED THE COMPANY TO BARGAIN WITH THE UNION.

In *N.L.R.B. v. Gissel Packing Co.*, *supra*, 395 U.S. 575, the Supreme Court sustained the Board's remedial authority to issue a bargaining order in cases, such as the instant one, in which unfair labor practices have been committed "that interfere with the election processes and tend to preclude the holding of a fair election." *Id.* at 594. The Court indicated that in such cases, a bargaining order would be appropriate (1) where the employer's unfair labor practices are so "pervasive" and "coercive" that it is the only effective means of remedying those unfair labor practices, or (2) where the unfair labor practices, though less substantial, are nonetheless such that "the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected a bargaining order." *Id.* at 610, 614. Moreover, the Court emphasized, "It is for the Board and not the courts . . . to make [the determination] whether the effects of the employer's unfair labor practices can be erased without issuance of a bargaining order, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." *Id.* at 612, n. 32.

The Company asserts that the Union's election objections were neither timely nor in proper form and that, under Board law, no bargaining order may issue.⁹ The Company further contends that even if the issuance of

⁹ A union that loses an election may nevertheless seek a bargaining order under Section 8(a)(5) of the Act where the employer has engaged in conduct warranting
(cont'd)

a bargaining order was consistent with Board law, such an order is not appropriate in the circumstances of this case. We show below that these contentions are without merit.

A. The Board properly received the Union's Objections to Conduct Affecting the Results of the Election.

As shown in the Counterstatement, the election was conducted on March 16 and resulted in a majority of the employees voting against the Union. On March 21, within the 5-day period required by the Board's rules, the Union filed objections to conduct affecting results of the election in the form of a telegram as follows:

GENTLEMEN: PLEASE BE ADVISED THAT THE UNION OBJECTS TO THE ELECTION CONDUCTED IN THE ABOVE MANNER [sic] ON WEDNESDAY, MARCH 15 [sic]. DURING THE COURSE OF THE ELECTION CAMPAIGN THE COMPANY ENGAGED IN A COURSE OF CONDUCT WHICH BOTH COERCED THE EMPLOYEES IN THE EXERCISE OF THEIR FREE CHOICE IN VIOLATION OF SECTION 8(a)(1) AND ADDITIONALLY THIS CONDUCT UPSET THE "LABORATORY CONDITIONS" SURROUNDING THE ELECTION. A DETAILED STATEMENT OF POSITION WILL FOLLOW.

(A. 160-161; 11). That same day, the Regional Director wrote a letter to the Union requesting it to submit "evidence in support of your objections . . . within 7 days of the date of this letter" (A. 161; 155). On March 28, the Union timely filed a detailed statement containing six specific objections (A. 161; 12-13) and on April 1, it filed an unfair labor

⁹ (cont'd) the setting aside of the election. But the Board will not issue a bargaining order in such a case "unless the election be set aside upon meritorious objections filed in the representation case." *Irving Air Chute Company*, 149 NLRB 627, 629-630 (1964), enforced, 350 F.2d 176 (C.A. 2, 1965).² The Company's contention is that no "meritorious objections" were filed in this case.

practice charge against the Company alleging violations of Section 8(a)(1) and (5) of the Act (A. 161; 25-27).¹⁰

On April 11, the Company filed a motion to dismiss the election objections on the grounds that they were untimely filed and not in the form or substance required by Section 102.69 of the Board's Rules and Regulations (A. 161; 14-16).

A Complaint and Notice of Hearing alleging violations of Section 8(a)(1), (3), and (5) of the Act was issued on May 16 (A. 161-162; 31-35). On May 18, the Regional Director issued a Report and Recommendations on Objections which included a finding that "the objections were timely filed, and contained the necessary form and substance to comply with Section 102.69 of the Board's Rules and Regulations." He further stated that "it does not appear that the Employer was prejudiced by the manner of the filing of the objections" and, accordingly, denied the Company's motion to dismiss the objections (A. 162; 17-20). No exceptions were filed to the Director's report. On June 2, the Board, in accord with the Regional Director's recommendations, ordered the hearing on objections to be consolidated with the unfair labor practice case (A. 162; 22-24).

1. The failure of the Company to except to the Regional Director's Report precludes it from attacking the timeliness or form of the Union's election objections.

It is settled law that failure to except to a Regional Director's decision concerning objections to an election precludes judicial review of that decision at a later stage of the proceedings. *N.L.R.B. v. Thompson Transport Co.*, 406 F.2d 698, 701-702 (C.A. 10, 1969); *N.L.R.B. v. Louisiana*

¹⁰ The charge was later amended to include a Section 8(a)(3) charge as well (A. 161; 28-30).

Industries, Inc., 414 F.2d 227 (C.A. 5, 1969), cert. denied, 396 U.S. 1039; *N.L.R.B. v. Rexall Chemical Co.*, 370 F.2d 363, 365-366 (C.A. 1, 1967). In this case, the Company failed to take exception to the Regional Director's Report denying its motion to dismiss the objections on grounds of timeliness and form. Accordingly, it "lost its opportunity for judicial review of its contentions by failing to avail itself of the administrative remedy afforded by [Board Rule 102.69]." *N.L.R.B. v. Rexall Chemical Co.*, *supra*, 370 F.2d at 365.

The Company's contention that the Regional Director's decision was merely interlocutory, thereby eliminating the necessity of filing exceptions, is plainly without merit. The Regional Director ordered a hearing for the sole purpose of considering the *merits* of the Union's objections. It specifically *denied* the Company's motion to dismiss the objections on procedural grounds. The issue thus having been raised, it was incumbent upon the Company to assert its objections. Under settled law, its failure to do so precludes further view.

2. In any event, the Union's objections were timely and in sufficient form and substance to meet the requirements of Section 102.69 of the Board's Rules and Regulations.

It has long been settled that the Board has been entrusted by Congress with the control of election proceedings. *N.L.R.B. v. Waterman Steamship Corp.*, 309 U.S. 206, 226 (1940); *N.L.R.B. v. MarSalle, Inc., d/b/a MarSalle Convalescent Home*, ____ U.S. App. D.C. ____, 425 F.2d 566, 570 (1970); *International Brotherhood of Electrical Workers v. N.L.R.B. (Presto Mfg. Co.)*, 135 U.S. App. D.C. 197, 199, 417 F.2d 1144, 1146 (1969), cert. denied, 396 U.S. 1004. Since the "determination whether a representation election was fairly or unfairly conducted . . . is primarily for the Board," the reviewing court "must be slow to overturn a discretionary

determination by the Board." *N.L.R.B. v. Golden Age Beverage Co.*, 415 F.2d 26, 29 (C.A. 5, 1969), and cases cited therein. The only question to be considered by a reviewing court is whether the Board, in ruling on objections, acted within its "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *N.L.R.B. v. A. J. Tower*, 329 U.S. 324, 330 (1946). Accord: *N.L.R.B. v. Tennessee Packers, Inc.*, 379 F.2d 172, 180 (C.A. 6, 1967), cert. denied, 389 U.S. 958.

Pursuant to this statutory mandate, the Board has promulgated rules and regulations specifying, *inter alia*, the procedure to be followed in objecting to the conduct of a Board-sponsored certification election. Section 102.69(a) of the Rules and Regulations provides that any party may, within 5 days after the tally of ballots has been furnished, file with the Regional Director copies of objections to the conduct of the election, which "shall contain a short statement of the reasons therefor." 29 C.F.R. 102.69(a). In interpreting its own Rules, the Board declared in *Atlantic Mills Servicing Corporation of Cleveland*, 120 NLRB 1284, 1288 (1958), that "where objections *prima facie* describe conduct which might warrant a new election, and the objecting party furnishes supporting evidence to the Regional Office, Section 102.61, Series 6, as amended [currently Section 102.69(a)] is satisfied and the Regional Director may go forward with an investigation" (emphasis supplied). Such evidence must be submitted forthwith at the Regional Director's request. *Atlantic Mills, supra*, 120 NLRB at 1288, n. 7.¹¹

¹¹ Prior to 1958, the Board required that evidence supporting the objections be presented at the time the objections were filed, and did not entertain evidence later discovered. *Don Allen Midtown Chevrolet, Inc.*, 113 NLRB 879 (1955). The *Atlantic Mills* decision relaxed this rule and specifically overruled *Don Allen*. 120 NLRB at 1288.

The Union fully complied with the Board's Rules and Regulations and with the Regional Director's request. It filed its objections within the 5 days specified in Rule 102.69(a) and filed a detailed statement of objections, with supporting evidence, within the time specified by the Regional Director in his letter of March 21.

In any event, the Company was not prejudiced by the manner in which the objections were filed. In this regard, the Director requested and received supporting evidence within a week of his request therefor, and the investigation was not initiated until he was satisfied that sufficient information was provided indicating the objections were not frivolous (A. 20). A full hearing was then ordered to determine the merits of the objections (A. 20). It is thus apparent that the Director properly received and investigated the Union's election objections and, therefore, that the election was properly set aside.

B. A bargaining order is appropriate in the circumstances.

As we have shown, the Company responded to the Union's organizational drive by engaging in a broad-gauged campaign designed to destroy the Union's majority. The Company's efforts included coercive interrogations; repeated threats of plant closure, discharge, loss of jobs, arduous working conditions and reduction of hours; and the promulgation and enforcement of an unlawfully broad no-solicitation rule. In addition, the Company made implied promises of benefit to discourage unionism and constructively discharged an employee because of his union activities. It is thus clear, as the Board found, that "Respondent's pattern of unlawful conduct . . . was of such a nature as to have a lingering coercive effect [and that] use of traditional remedies is unlikely to insure a fair or coercion-free election" (A. 206). Accordingly, the Board properly determined that the purposes of the Act

would best be effectuated by reliance on the authorization cards. See *Food Store Employees' Union, Local 347 v. N.L.R.B. (Heck's Inc.)*, ____ U.S. App. D.C. ____, 433 F.2d 541 (1970); *United Steelworkers of America v. N.L.R.B. (Quality Rubber Mfg. Co., Inc.)*, ____ U.S. App. D.C. ____, 430 F.2d 519 (1970); *Amalgamated Clothing Workers of America v. N.L.R.B. (McEwen Mfg. Co.)*, 136 U.S. App. D.C. 226, 227-228, 419 F.2d 1207, 1208-1209 (1969), cert. denied, 397 U.S. 988.¹²

The Company contends, however, that a bargaining order is no longer appropriate because of the passage of time and a suggested turnover of unit personnel. But the Supreme Court made clear in *Gissel* that a lapse of time and intervening employee turnover do not justify a court of appeals' refusal to enforce a bargaining order remedy in a case such as this one. The Court stated (395 U.S. at 610):

We have long held that the Board is not limited to a cease-and-desist order in such cases, but has authority to issue a bargaining order without first requiring the union to show that it has been able to maintain majority status. See *N.L.R.B. v. Katz*, 369 U.S. 736, 748, n. 16 (1962); *N.L.R.B. v. P. Lorillard Co.*, 314 U.S. 512 (1942). And we have held that the Board has the same authority even where it is clear that the union, which once had possession of cards from a majority of the employees, represents only a minority when the bargain order is entered. *Franks Brothers Co. v. N.L.R.B.*, 321 U.S. 702 (1944). We see no reason now to withdraw this authority from the Board . . .

¹² Since the Company unlawfully refused to bargain with the Union, its institution of a unilateral wage increase thereafter (*supra*, p. 9) constituted a further violation of Section 8(a)(5) and (1) of the Act. *N.L.R.B. v. Katz*, 369 U.S. 736, 747 (1962); *Dallas General Drivers, Local 745 v. N.L.R.B. (Farmers Cooperative Gin Ass'n)*, *supra*, 128 U.S. App. D.C. at 384, 389 F.2d at 554; *N.L.R.B. v. United Nuclear Corp.*, 381 F.2d 972, 976 (C.A. 10, 1967).

For, the Court added (*id.*, at 610-611):

If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him "to profit from [his] own wrongful refusal to bargain," *Franks Brothers, supra*, at 704, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under these circumstances would be unlikely to demonstrate the employees' true undistorted desires.

Gissel also rejected the view, which is implied in the Company's position before the Board, that to impose a bargaining order on employees who may not now desire the union, "is an unnecessarily harsh remedy that needlessly prejudices employees §7 rights" (395 U.S. at 612). The Court stated (*ibid.*):

Such an argument ignores that a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election, he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign . . . [13]

¹³ The Court added (*id.*, at 613):

There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition. . . .

In *N.L.R.B. v. L. B. Foster Co.*, 418 F.2d 1 (C.A. 9, 1969), cert. denied, 397 U.S. 990, the Ninth Circuit applied the foregoing rationale and sustained a bargaining order remedy where a substantial turnover in unit personnel had occurred between the time of the employer's unlawful conduct and the issuance of the order.¹⁴ The Court stated (418 F.2d at 4):

The delay is not the fault of the union; if it is anyone's fault, it is that of the employer. But regardless of fault, it is an unfortunate but inevitable result of the process of hearing, decision and review prescribed in the Act. And to deny enforcement, with or without remand for reconsideration on the basis of facts occurring after the Board's decision, is to put a premium on continued litigation by the employer; it can hope that the resulting delay will produce a new set of facts, as to which the Board must then readjudicate.

* * * When is the process to stop?

The Court added (*id.*, at 8);

[T]he rapid turnover in the employer's personnel . . . is a reason to enforce. Otherwise, there will be an added inducement to the employer to indulge in unfair labor practices in order to defeat the union in the election. He will have as an ally, in addition to the attrition of union support inevitably springing from delay in accomplishing results, the fact that turnover will help him . . .

See also, *Southwest Regional Joint Board v. N.L.R.B. (Levi Strauss & Co.)*, U.S. App. D.C. , F.2d (decided December 15, 1970), 76 LRRM 2033, 2038.

¹⁴ As the Ninth Circuit noted in that case (418 F.2d at 5), "the Union began with 14 of 18 employees and was down to five signers out of nine in the unit when the election was held."

We anticipate that the Company will rely on the decisions of the Courts of Appeals for the Fifth and Sixth Circuits in *N.L.R.B. v. American Cable Systems, Inc.*, 427 F.2d 446 (C.A. 5, 1970), cert. denied, 400 U.S. 957 and *Clark's Gamble Corp. v. N.L.R.B.*, 422 F.2d 845 (C.A. 6, 1970), cert. denied, 400 U.S. 868, as support for its contention that a bargaining order is inappropriate here. For the reasons stated below, we respectfully disagree with these decisions and urge the Court not to follow them.

In *American Cable*, the Fifth Circuit held that the propriety of a bargaining order should be determined as of the time the order is issued by the Board. This, we submit, misconceives the plainly-stated rationale of *Gissel* and would render a bargaining order inappropriate in a large majority of the cases where the Supreme Court sanctioned its use. For in virtually every case, by the time a Board decision is reached, there is likely to have been sufficient employee turnover and other changes to make it arguable, where the employer has meanwhile refrained from committing new unfair labor practices, that an election held now would be free of the taint of the old unfair labor practices. But the union and the employees then supporting it were entitled to an election at an earlier time and, if the employer's unfair labor practices were of such a nature as to deprive them of an election at that time, to permit one now, when the union's support has been unlawfully dissipated, "would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain.'" *Gissel, supra*, 395 U.S. at 610.

The Sixth Circuit's decision in *Clark's Gamble*, which refused to enforce the Board's bargaining order because of the long delay attributable to the Board, similarly rested upon considerations rejected by *Gissel*. As shown above, the Supreme Court in *Gissel* specifically reaffirmed the principle that the lapse of time between the filing of the unfair labor practice

charge and the date of the Board's order is no bar to enforcement of a bargaining order. For the litigation process will always result in delays, and this is especially true where, as here, a novel and difficult issue is raised by one of the parties (the Union's compensatory remedy request). To permit such delay to be used as an excuse for not enforcing an otherwise appropriate bargaining order "ignores that the bargaining order is designed as much to remedy past election damage as it is to deter future misconduct" and, as in *American Cable*, would allow an employer to profit from his wrongful refusal to bargain. *Gissel*, *supra*, 395 U.S. at 610, 612. See also, *N.L.R.B. v. Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 265 (1969); *Southwest Regional Joint Board v. N.L.R.B. (Levi Strauss & Co.)*, *supra*, 76 LRRM at 2038.¹⁵

III. THE BOARD PROPERLY DENIED THE UNION'S REQUEST FOR A "COMPENSATORY DAMAGES" REMEDY

In this case, as in the companion *Ex-Cell-O* case which is currently pending before this Court (*Ex-Cell-O Corp.*, 185 NLRB No. 20 (1970); Nos. 24,577 and 24,715 – *International Union, UAW v. N.L.R.B.; Ex-Cell-O Corp. v. N.L.R.B.*), the Board denied the Union's request for a "compensatory damages" order to remedy the Company's unlawful refusal to bargain. The basis for the Board's decision in this regard¹⁶ is that the Board lacks the statutory authority to

¹⁵ The Sixth Circuit has itself restricted *Clark's Gamble* and has declined to apply the holding of that case to other situations where, as in the case at bar, the company's "own willful and gross violations of the NLRA directly caused both the turnover of employees and the delay." *G.P.D., Inc. v. N.L.R.B.*, 430 F.2d 963, 964 (C.A. 6, 1970); accord, *N.L.R.B. v. Lou deYoung's Market Basket*, 430 F.2d 912, 915 (C.A. 6, 1970).

¹⁶ The rationale is set forth in the Board's *Ex-Cell-O* decision, which has been reprinted in full in the Appendix herein (A. 230-270).

grant such a remedy. The Union contends that the Board has erred, and it is to this contention that we now turn.

Section 10(c) of the Act authorizes the Board to direct a party found to have engaged in conduct violative of the Act "to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." It is now well settled that the Board has broad discretion in the framing and issuing of remedial orders.¹⁷ But the Board's power in this regard is not unlimited;¹⁸ its orders must be those "which can fairly be said to effectuate the policies of the Act."¹⁹ Remedial orders may not be punitive or confiscatory, and they must be related to the situation that calls for redress.²⁰

Remedial orders under Section 8(a)(5) — specifically, those affirmative orders that require parties to bargain — are subject to an additional

¹⁷ *Office and Professional Employees Int'l Union, Local 425 v. N.L.R.B.*, 136 U.S. App. D.C. 12, 19-20, 419 F.2d 314, 321-322 (1969); *Amalgamated Clothing Workers of America v. N.L.R.B. (Hamburg Shirt Corp.)*, 125 U.S. App. D.C. 275, 281, 371 F.2d 740, 746 (1966).

¹⁸ *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 10-11 (1940).

¹⁹ *Virginia Electric and Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943). See also *International Union, UAW v. Russel*, 356 U.S. 634, 642-643 (1958), wherein the Supreme Court noted that the affirmative remedial power of the NLRB "is merely incidental to the primary purpose of Congress to stop and prevent unfair labor practices."

²⁰ *N.L.R.B. v. Seven-Up Bottling Co.*, *supra*, 344 U.S. at 349; *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 655 (1961); *Republic Steel Corp. v. N.L.R.B.*, *supra*, 311 U.S. at 610.

restriction. Section 8(d), which defines the bargaining obligation,²¹ states clearly and succinctly that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." These provisions were adopted in the 1947 amendments to the Act because Congress was concerned that

The present Board has gone very far, in the guise of determining whether or not employers bargain in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals they may or may not make
[U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process further and seek to control more and more of the terms of collective bargaining agreements.

H. Rep. No. 245, 80th Cong. 1st Sess. 19-20, I Legislative History of the Labor Management Relations Act of 1947 at 310-311. See also S. Rep. No. 105, 80th Cong. 1st Sess. 24, I Legislative History of the Labor Management Relations Act of 1947 at 430.²²

²¹ Section 8(d) provides as follows:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any questions arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

²² When the Senate inserted the bargaining duty into the Act in 1935 it said:
The committee wishes to dispel any possible false impression that the bill is designed to compel the making of agreements or

(cont'd)

And as the Supreme Court, in construing Section 8(d), has made clear, the Act neither compels agreement between employers and unions nor regulates the substantive terms and conditions of employment that are incorporated in a collective bargaining agreement. *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 402 (1952); see also, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, *supra*, 301 U.S. at 45. "[T]he Board may not, *either directly or indirectly*, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *N.L.R.B. v. American National Insurance Co.*, *supra*, 343 U.S. at 404 (emphasis added); accord, *N.L.R.B. v. Insurance Agents Intl. Union*, 361 U.S. 477, 486, 487, 490 (1960).

The touchstone of the Board's decision in this case, in addition to Section 8(d) and the cases cited above, is the Supreme Court's recent holding in *H. K. Porter v. N.L.R.B.*, 397 U.S. 99 (1970). There, the company had refused a union request for a checkoff provision, not for any economic or policy reasons, but solely on the grounds that the company was not going to assist the union in any way. In addition to affirming the Board's finding that the company had thus violated Section 8(a)(5) of the Act, the Court of Appeals held that in certain circumstances the

²² (cont'd) to permit governmental supervision of their terms. *It must be stressed that the duty to bargain collectively does not carry with it the duty to make an agreement*, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory (emphasis supplied).

S. Rep. No. 573, 74th Cong. 1st Sess. 12, II Legislative History of the National Labor Relations Act of 1935 at 2312. See Hearings on S. 1958 before the Senate Committee on Labor and Public Welfare 716, II Legislative History of the National Labor Relations Act of 1935 at 2102; Senate debate on S. 1958, 79 Cong. Rec. 7571, 7659-60, 7672, II Legislative History of the National Labor Relations Act of 1935 at 2335-36, 2372-74, 2392. See also *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

Board had the power to require the company to agree to a checkoff provision as a means of remedying its bad faith bargaining. The Supreme Court reversed, holding that while the Board had the power to order an employer to bargain with a union, "it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement" (397 U.S. at 102). The Court noted that while the basic purpose of the Act was to promote bargaining, "it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement" (397 U.S. at 103-104). Section 8(d), the Court went on, limited the Board's remedial power in this respect (397 U.S. at 107-108):

It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while §8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under §10 of the Act are broad, but they are limited to carrying out the policies of the Act itself [footnote omitted]. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act [footnote omitted], allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Finally, the Court noted that the Act as presently written does not contemplate an exact parity of economic strength, and that the industrial realities might well lead to bargaining impasses and then to strikes and lockouts, although these are the antithesis of "the industrial peace which the Act was designed to further" (397 U.S. at 109). The Court concluded (*ibid.*):

It may well be true, as the Court of Appeals felt, that the present remedial powers of the Board are insufficiently broad to cope with important labor problems. But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process.

In *Ex-Cell-O* — and in the case at bar as well — the Board properly concluded that Section 8(d) and *H. K. Porter* made it clear that the Board lacks the statutory authority to impose a "compensatory damages" order to remedy a refusal to bargain violation (A. 234-240). For in order to grant such a remedy, the Board would have to do precisely what the statute and the consistent case law say it may not do — write a contract for the parties. To decide whether damages have occurred and then to measure any such damages found, the Board would necessarily, as a preliminary matter, have to conclude that the parties would have reached agreement had the employer bargained in good faith from the outset. This may itself be an unwarranted assumption (see *N.L.R.B. v. H. K. Porter, supra*, 397 U.S. at 103-104), the Union's assertion of the statistical probabilities to the contrary notwithstanding (Union Br., pp. 27-36). But as the Board noted in *Ex-Cell-O*, the problem goes much further: even if the first hurdle — whether agreement would have been reached — is

surmounted, who is to say what the terms of that agreement would have been? For the make-whole remedy proposed by the Union necessarily involves an attempt to reconstruct the contract that the Union asserts would probably have been consummated had the parties bargained in accordance with the Act. Implicit in a determination of what benefits employees would have received is a decision as to the specific terms of the agreement with respect to those benefits. The Board is thus being requested retroactively to establish by decree a collective bargaining agreement for which neither proposals nor counterproposals have been made and to which the parties have not agreed. The remedy, therefore, is contrary to the expressed Congressional mandate as well as to the consistent precedential law.

The Union, relying upon the decision of this Court in *Tüdee I*²³ and subsequent cases,²⁴ argues that Section 8(d) pertains to the right of parties to engage in "hard bargaining" without Board interference *after* negotiations have begun but that it does not apply to conduct occurring prior to the commencement of bargaining. It concludes that "[t]he compensatory remedy for . . . refusing to bargain [in the past] will in no way

²³ *International Union of Electrical Workers v. N.L.R.B. (Tüdee Products Inc.)*, 138 U.S. App. D.C. 249, 426 F.2d 1243 (1970), cert. denied, (75 LRRM 2752).

²⁴ See *United Steelworkers v. N.L.R.B. (Quality Rubber Mfg. Co.)*, 139 U.S. App. D.C. 146, 430 F.2d 519 (1970) (Judges Wright, MacKinnon and Davis); *Food Store Employees v. N.L.R.B. (Heck's, Inc.)*, 139 U.S. App. D.C. 383, 433 F.2d 541 (1970) (Judges Bazelon, McGowan and Leventhal); *Local 153, ILGWU v. N.L.R.B. (Marie Phillips, Inc.)*, U.S. App. D.C. , F.2d (decided November 9, 1970), 75 LRRM 2539 (Judges Wright, McGowan and MacKinnon); *Southwest Regional Joint Board v. N.L.R.B. (Levi Strauss & Co.)*, U.S. App. D.C. , F.2d (decided December 15, 1970), 76 LRRM 2033 (Judges Fahy, Robinson and Wilkey); *International Union of Electrical Workers v. N.L.R.B. (Tüdee Products II)*, U.S. App. D.C. , F.2d (decided December 23, 1970), 76 LRRM 2109 (Judges Leventhal, Robinson and MacKinnon).

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64 CCH ¶ 11,355
64 CCH ¶ 11,370
n.b. in *Levi Strauss*, Judge Fahy said (in *Tüdee Products*) "This could well be held that grant such monetary relief was w/in the board's power under Section 10(c)

interfere with the Company's freedom to negotiate in the future" and that a Board order containing such remedy does not violate Section 8(d) (Un. Br. pp. 24, 44-45). We submit, however, that the portion of *Tiidee I* which discusses the compensatory remedy issue is not dispositive of this point. For *Tiidee I* was decided well before the Board's *Ex-Cell-O* decision and without the benefit of the Board's view on the matter. The Board, therefore, expresses its respectful disagreement with *Tiidee I* and requests the Court to reconsider its position.

The union's petition for review in *Tiidee I* asserted as error the Board's failure to discuss its request for a "compensatory damages" remedy in a case involving flagrant violations of Sections 8(a)(1), (3) and (5) of the Act. The Board argued before the Court that it was under no obligation to spell out its reasons for not granting an expanded Section 8(a)(5) order where it was issuing its usual bargaining order.²⁵ It was this issue — the only issue presented by the Union's petition for review and briefed by the Board to the Court — that the Court passed upon. The majority (Judges Leventhal and Robinson, Judge MacKinnon dissenting on this point) held that the Board had simply not explained the basis of its decision that the usual bargaining order, without more, would effectuate the policies of the Act where the union had pressed for an expanded order and the Trial Examiner had specifically declined to grant it. (138 U.S.

²⁵ The Trial Examiner in *Tiidee I* had considered the union's request for an expanded remedy provision regarding the refusal to bargain, but noted that such an order had never before been issued by the Board and, more importantly, that the propriety of such an order was then pending before the Board in the *Ex-Cell-O* case. He concluded, therefore, that "As the remedy requested . . . involves both legal and policy questions which should be initially considered by the Board, I am not inclined to grant the remedy requested by the Union" (*Tiidee Products, Inc.*, 174 NLRB No. 103 (1969), TXD, p. 18); see also 138 U.S. App. D.C. at 256, 426 F.2d at 1250. The union then filed timely exceptions to the Examiner's failure to grant the requested remedy, but the Board affirmed without specifically mentioning the compensatory remedy issue.

App. D.C. at 255, 256, 426 F.2d at 1249, 1250.) The Court noted the presumption that favors the Board's selection of remedies, but concluded that that presumption would be

given full effect when the Board makes a conscious selection of its remedies to effectuate the Act, provided reasons for its conclusions are stated or may fairly be discerned. That is not the situation before us. The Board's silence on a substantial question raised by the Union is not sanctified by the circumstance that it was being passive rather than affirmative.

(138 U.S. App. D.C. at 256, 426 F.2d at 1250.) It was for this reason — and on this ground alone — that the Court remanded *Tiidee I* to the Board “for further consideration of the make-whole claim * * * If the Board believes that alternative remedies, beyond those already granted [i.e., the bargaining order] are more appropriate, it should so state. The assessment of these matters is for the Board” (138 U.S. App. D.C. at 259, 426 F.2d at 1253). The Court also held that, if the Board on remand concluded that the “compensatory damages” remedy sought by the union went too far, it could consider lesser alternative remedies, such as the award of excess organizational costs, litigation expenses, and the like (138 U.S. App. D.C. at 259, n. 15, 426 F.2d at 1253, n. 15).

The majority's decision, however, went beyond the issue actually litigated and discussed in some detail the Board's statutory authority to issue such an order in an appropriate case. The majority concluded that the compensatory remedy was neither too speculative nor outside the scope of the Board's remedial authority, and that neither Section 8(d) nor the Supreme Court's decision in *H. K. Porter* precluded the granting of such a remedy. In the majority's view, the issuance of a “compensatory damages” remedy did not compel agreement or set contractual terms of employment:

[T]he make-whole remedy — which could be measured not by any sentiment as to what the parties *should* have agreed to, but only by a determination, on the basis of all the evidence available, of what it is likely the parties *would* have agreed to — provides money compensation as a remedy for past wrongs. Combined with the traditional remedy, it imposes no present or future contract obligations, and operates as to the future not by assuring the employees any right to certain terms, but only by requiring for the future what could not be provided for the past, *i.e.*, collective bargaining as required by the law. This approach is not forbidden by Section 8(d) of the Act. [footnote omitted]

(138 U.S. App. D.C. at 258, 426 F.2d at 1252, emphasis in original). Judge MacKinnon, dissenting to the remedy portion of the Court's decision, concluded that the Board did not have the power to order the "compensatory damages" remedy (138 U.S. App. D.C. at 259-263, 426 F.2d at 1253-1257).

Thus, while the majority in *Tiidee I* expressed clearly its view that neither the statute nor the case law precluded the Board's issuance of a compensatory damages remedy, that determination was, we submit, dictum, wholly unnecessary to the decision in *Tiidee I* and not fully litigated in that case or in the cases decided by this Court subsequent to *Tiidee I*.²⁶ On this ground, we respectfully urge the Court not to deem itself bound by considerations of *stare decisis* on the issue of the Board's statutory authority, but to consider this issue afresh on the basis of the Board's *Ex-Cell-O* decision. Indeed, the Court itself seems to have recognized that the issue of the Board's remedial authority in this regard is not foreclosed by *Tiidee*

²⁶ See note 24, *supra*.

I. In the *Marie Phillips* case,²⁷ which involved a similar issue but which was decided after *Ex-Cell-O* had been handed down by the Board and a petition for review filed in this Court, the Court declined to decide the remedy issue presented by the union's claim for additional remedies but decided, instead, to await the completion of the litigation in *Tiidee I* (which was then pending on the company's petition for a writ of certiorari — later denied by the Supreme Court) and in *Ex-Cell-O*. But see *Southwest Regional Joint Board v. N.L.R.B.*, *supra*, n. 24, 76 LRRM 2033, 2039.

We recognize, of course, that a number of judges of this Court have expressed their agreement with *Tiidee I* (see n. 24, *supra*). But whether or not that decision is largely dictum, the Board had not, at the time it issued, had an opportunity to express its views on the matter of the compensatory remedy. We respectfully urge the Court, therefore, to reconsider the issue in the light of the Board's views. For the distinction that the Union seeks to have the Court make — between setting terms of employment for the parties on the one hand, and assessing damages based on what the parties would probably have agreed to, on the other — is, as the Board concluded, "more illusory than real" (A. 238). It would impose financial liability upon an employer based on a presumed contractual agreement for which the employer must accept responsibility, in the form of damages, just as if he had in fact agreed to it, and would create the anomalous situation of prohibiting the Board from prospectively imposing contractual terms on parties,²⁸ while at the same time permitting it to impose those

²⁷ *Local 153, ILGWU v. N.L.R.B. (Marie Phillips, Inc.)*, U.S. App. D.C. , F.2d (decided November 9, 1970), 75 LRRM 2539.

²⁸ "Though the Board may properly order execution of a contract to which the parties have agreed [footnote omitted], it may not order execution of a contract to which it thinks they should have agreed" [footnote omitted]. *Retail Clerks Int'l Ass'n v. N.L.R.B. (Montgomery Ward & Co.)*, 125 U.S. App. D.C. 389, 394, 373 F.2d 655, 660 (1967). See also, *Cooper Thermometer v. N.L.R.B.*, 376 F.2d 684, 690-691 (C.A. 2, 1967); *N.L.R.B. v. George E. Light Boat Storage, Inc.*, 373 F.2d 762, 770 (C.A. 5, 1967).

same terms retroactively. Such a result was clearly not contemplated by Section 8(d), as the Board in *Ex-Cell-O* recognized (A. 239):

Our [dissenting] colleagues contend that a compensatory remedy is not the "writing of a contract" because it does not "specify new or continuing terms of employment and does not prohibit changes in existing terms and conditions." But there is no basis for such a remedy unless the Board finds, as a matter of fact, that a contract would have resulted from bargaining. The fact that the contract, so to speak, is "written in the air" does not diminish its financial impact upon the recalcitrant employer who, willy-nilly, is forced to accede to terms never mutually established by the parties. Despite the admonition of the Supreme Court that Section 8(d) was intended to mean what it says, *i.e.*, that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession," one of the parties under this remedy is forced by the Government to submit to the other side's demands.

Supportive of this conclusion are the problems that would necessarily be created if the Union's contentions were to prevail. For the remedy suggested by the Union necessarily rests on two premises: first, that a contract would in fact have been negotiated between the Company and the Union, and second, that the benefits that would have accrued to employees under this hypothetical contract can be given an ascertainable monetary value. These two assumptions are, at best, highly speculative, and render the requested remedy both impractical and arbitrary. Thus, as we have discussed above, the statutory duty to bargain in good faith does not compel the parties to reach agreement. Whatever the statistical

probability of this occurring,²⁹ it is plainly speculative whether this particular employer and this particular union at this particular location would have *in fact* reached agreement. As a number of commentators have pointed out, the chances of obtaining a contract depend, in large part, on the willingness of employees at the particular place of business to engage in economic action (e.g., a strike) to obtain additional benefits and, given such willingness, on their having the economic power to carry it off. See, e.g., Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 135 (1964) ("The employees need not strike against their will. And they generally possess some influence over the terms of the bargain, if only because the contract will depend, in the last analysis, on their willingness to fight to obtain it"); A. Cox and D. Bok, *Cases on Labor Law* 905 (6th Ed. 1965) ("To put it in a phrase, the strike or the fear of a strike is the motive power that makes collective bargaining operate").³⁰

²⁹ Professor Ross found, in his 5-year study of Section 8(a)(5) cases, that where parties bargained voluntarily, contracts were eventually executed in some 86% of the cases. P. Ross, *The Labor Law in Action, An Analysis of the Administrative Process Under the Taft-Hartley Act*, pp. 12, 16 (NLRB 1966).

³⁰ Accord: Baier, *Rights Under a Collective Bargaining Agreement: The Question of Monetary Compensation for a Refusal to Bargain*, 47 J. Urban L. 253, 309 (1969); Parker, *Employee Reimbursement for an Employer's Refusal-to-Bargain: The Ex-Cell-O Doctrine*, 46 Tex. L. Rev. 758, 764 (1968). In one such study, the author concluded that the Teamsters Union was far more successful than other unions in obtaining contracts, even in the face of unfair labor practices, because of its economic power and its willingness to strike in order to obtain benefits. Wolkinson, *The Remedial Efficacy of NLRB Remedies in Joy Silk Cases*, 55 Cornell L. Rev. 1, 14-15 (1969).

Furthermore, the chances of obtaining a contract in any given situation are largely dependent upon the attitudes of management as well. Specifically, an employer who engages in Section 8(a)(5) conduct is more likely to be a "hard bargainer" than one who voluntarily agrees to bargain with a union.³¹ This factor further decreases the chances that a contract would have been negotiated between the parties. See Note, *An Assessment of the Proposed Make-Whole Remedy* 67 Mich. L. Rev. 374, 378-379 (1968) Parker, *Employee Reimbursement for an Employer's Refusal to Bargain*, *supra*, 46 Tex. L. Rev. at 764.

Aside from the relative bargaining strengths and attitudes of the parties, numerous other factors may have an effect on the ultimate chances of successfully concluding an agreement. Thus, a marginal employer might be forced either to move his plant or to go out of business because of excessive union demands, or, even, if he does not close or move his business, competitive factors might compel him to resort to subcontracting, the adoption of automated procedures, or some other measure designed to reduce his labor costs. See Comment, *The Labor-Management Relationship: Present Damages for Loss of Future Contracts*, 71 Yale L.J. 563, 573 (1962).³²

³¹ See P. Ross, *The Labor Law in Action*, *supra*, pp. 7-8, where it is suggested that employers who engage in such 8(a)(5) conduct typically show a great deal of "intransigence" in all dealings with unions.

³² Among the reasons cited by Professor Ross for the failure of parties to complete a contract in the cases studied, included abandonment or disclaimer of interest by the union, the moving, closing or selling of the plant, and the continuance of negotiations. P. Ross, *The Labor Law in Action*, *supra*, p. 18.

Damages should be awarded only for "actual losses." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 198 (1941). An employer is not compelled to reach an agreement under the Act, and, as shown, determining whether a particular employer would have concluded an agreement with a particular union is, at best, a highly speculative proposition. Under these circumstances, the Board concluded (A. 239-240) that it would best effectuate the policies of the Act by limiting its remedy to the traditional bargaining order.³³

Even if the Board were able to conclude that a favorable contract would have been executed absent the unlawful refusal to bargain, it would still be faced with the almost impossible task of measuring the benefits the employees presumably would have received. And although it is true, as the Union notes (Br. p. 51), that uncertainties as to the amount of damages are resolved against the wrongdoer, the claimant must still provide a reasonable method to compute the damages or else be denied recovery on grounds that the award would be conjectural (and thus punitive) even if the wrongdoer's misconduct has prevented an accurate calculation. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 263-265 (1946); *Key West Hand Print Fabrics, Inc. v. Serbin, Inc.*, 269 F. Supp. 605, 614 (S. D. Fla. 1966), *aff'd per curiam*, 381 F.2d 735 (C.A. 5, 1967).

³³ The "compensatory damages" remedy in these circumstances is also vulnerable to a charge of being "punitive" (A. 237). It is well-settled that the Board's power "to command relief is remedial, not punitive." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 236 (1938). Accord: *Local 60, United Brotherhood of Carpenters v. N.L.R.B.*, 365 U.S. 651, 655 (1961); *Republic Steel Corp. v. N.L.R.B.*, *supra*, 311 U.S. at 10. Since an employer is not required to reach agreement, the employees might not have received benefits even if the employer had bargained in good faith. Requiring the employer to pay damages in these circumstances would put it in a worse position than it would have been absent a refusal to bargain and would, therefore, be a prohibited "punitive" order. See also *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 562 (1931), where the Supreme Court reaffirmed the principle barring recovery of damages where the *fact* of injury, as opposed to the *amount* of injury, is speculative.

The statistics offered by the Union (Br. 48-49) showing wage rates at allegedly comparable stores in the same geographical area, are of limited value in determining what benefits, if any, these particular employees would have received from this particular employer. For, as many bargaining theorists have suggested, "even within the same geographical area, 'markedly different types of union-management accommodation, coexist and the primary explanation for such divergencies lies in the attitudes and decisions of the particular parties.'" Baier, *Rights Under a Collective Bargaining Agreement*, *supra*, 47 J. Urban L. at 308, and articles cited. See also *The Labor-Management Relationship: Present Damages for Loss of Future Contracts*, *supra*, 71 Yale L. J. at 573. Nor do these statistics take into account the costs that might have been incurred in obtaining those benefits, specifically the lost wages that necessarily flow from an economic strike. Moreover, such a method does not and cannot take into account such factors as the economic situation at a particular store and the specific proposals and counterproposals that may arise during the course of bargaining. See Note, *An Assessment of the Proposed Make-Whole Remedy*, *supra*, 67 Mich. L. Rev. at 382-383.³⁴

The Union's contention (Un. Br. p. 20) that the determination of damages in this case would be "no more difficult or burdensome to administer than the Board's backpay awards for unlawful discrimination," is patently untenable. In normal backpay situations, only a few relatively uncomplicated factors need be considered, and the factors are ordinarily easily susceptible of monetary measurement. Thus, in a typical discharge case,

*See J. Gould
equivalent*

³⁴ Thus, a union may choose to forego a wage increase in order to obtain a check-off or union security clause. Similarly, an employer may receive, in exchange for a wage settlement, a strong management-rights clause or a right to install an incentive system. Note, *An Assessment of the Proposed Make-Whole Remedy*, *supra*, 67 Mich. L. Rev. at 383, n. 29.

the starting point in the effort to make an employee whole is the ascertainment of what he was earning when he was discharged — a figure that is easily arrived at and usually subject to little or no dispute. Dates of discharge and reemployment may also be fixed with certainty and, on such a basis, simple multiplication will establish with reasonable certainty what an employee would have earned if he had not been discharged. Actual loss suffered can be established by deducting interim earnings. To be sure, certain intangibles, such as wilful loss of interim earnings or the likelihood that employees would have been laid off for cause during the period in question, must also be considered. But the impact of these intangibles are necessarily minimized because of the existence of factors that lend themselves to ready measurement in dollars-and-cents terms.

By contrast, in the typical refusal-to-bargain case, only one factor is easily measurable — what the employees were earning when a violation occurred. The remainder — whether a contract would have been executed and, if so, the substantive terms — rests upon the sheerest speculation and assumption.

The Union (Br. 24-27) also substantially overstates the readiness of the Board and the courts to fashion remedies notwithstanding the amount of speculation such remedies would entail. Thus, where the parties have reached full agreement but refuse to execute the contract, the Board will ordinarily require that the contract be reduced to writing and executed and, in some cases, that the employees be reimbursed based on the agreed-upon contract terms. See *N.L.R.B. v. Strong*, 393 U.S. 357 (1969), and cases there cited. But such a remedy will not lie, no matter how egregious the unfair labor practice conduct, where the parties have not themselves reached agreement. Illustrative is this Court's decision in *Retail Clerks International Association v. N.L.R.B. (Montgomery Ward & Co.)*, 125 U.S. App. D.C. 389, 373 F.2d 655 (1967). There, following the conclusion

of national negotiations between the company and the International Union and during negotiations between the company and various locals of the International at locations throughout the country, the company, without any justification, unlawfully withdrew recognition from various locals at a number of locations. To remedy this refusal to bargain violation, the Board ordered the company, *inter alia*, to execute agreements at each of the locations involved. With respect to five locations, the Court enforced the Board's order in this regard, because the company and the local unions had reached final agreement and nothing remained, at the time recognition was withdrawn, but the formalities of signing the agreements (125 U.S. App. D.C. at 392-393, 373 F.2d at 658-659). With respect to 25 other locations, however, the Court denied enforcement of the contract-execution order. The Court noted that bargaining had not been concluded at these 25 locations when the company unlawfully withdrew recognition from the locals. The Board had urged that but for this unlawful conduct the company would have agreed to, and the employees would have ratified, the terms of the "national agreement." However, the "national agreement" contained no provisions for wages or hours, and it had been contemplated by the parties that these terms would be negotiated on a location-by-location basis. In these circumstances, the Court held, the Board's order ran afoul of Section 8(d), since its necessary effect would be for the Board to set terms and conditions of employment to which the parties had not mutually agreed. "Though the Board may properly order execution of a contract to which the parties have agreed, it may not order execution of a contract to which it thinks they should have agreed [footnotes omitted]." (125 U.S. App. D.C. at 394, 373 F.2d at 660). The Court also rejected the suggestion that the ascertainment of the wages and hours issue should be left to supplemental Board proceedings, on the ground that this, too, would have contravened Section 8(d) in just the same way (*Id.* at n. 13). For other cases where the

Board declined to order the execution of a contract to remedy an unlawful refusal to bargain violation, see, e.g., *Stylecraft Furniture Co.*, 111 NLRB 930, 931 (1955) (no agreement reached as to duration of contract); *Ridge Citrus Concentrate, Inc.*, 133 NLRB 1178 (1961) (same); *Silby-Dolcourt Chemical Industries, Inc.*, 145 NLRB 1348, 1349 (1964) (no agreement on liquidated damages provision in no-strike clause or on inclusion of arbitration provision in grievance clause); *Greer Stop Nut*, 162 NLRB 626, 630 (1967) (no agreement on checkoff provision and duration of contract).

Moreover, while the Board has compensated employees for losses resulting from an employer's unilateral change in working conditions (Unbr. 25), it will not grant a remedy if "there has been no proven adverse impact on the existing work conditions" resulting from the unilateral change. *District 50, U.M.W. v. N.L.R.B. (Allied Chemical Corp.)*, 358 F.2d 234, 237 (C.A. 4, 1966). And see *Wonder State Mfg. Co.*, 147 NLRB 179, 180-181 (1964), modified on other grounds, 344 F.2d 210 (C.A. 8, 1965), where the Board refused to grant a remedy for the employer's unilateral discontinuance of a bonus where it appeared that the employer's economic situation was such that he would have omitted the bonus in any event. Furthermore, even where the Board grants a remedy for unilateral changes by the employer, it bases its calculations on pre-change working conditions, rejecting as too speculative the determination of working conditions that "might have governed their employment had Respondent fulfilled its obligation to bargain with the [union] representative." *Chemrock Corp.*, 151 NLRB 1074, 1082 (1965).³⁵

³⁵ At one point in its brief (p. 47), the Union seems to be urging that a "compensatory damages" remedy is appropriate in order to prevent a wrongdoing employer from being unjustly enriched. Reimbursement remedies, however, are not designed to prevent unjust enrichment but only to compensate employees for losses to which

(cont'd)

From the foregoing discussion, it is apparent that settled law is contrary to the Union's contention and that application of the proposed remedy would require the Board to speculate as to the proposals and counter-proposals that would have been made by the parties, the progress of negotiations, the relative economic strengths of the parties, the concessions that would have been made by each side and, finally, whether an agreement would have been reached and, if so, when it would have been reached and what its terms would have been. And even if the Board were able to determine that a particular employer, bargaining in good faith, would indeed have signed an agreement giving his employees a "fair increase" (however that term might be defined), would the policies of the Act be effectuated by singling out this employer (and not the "hard bargainer" or the employer able to take a long strike or able to continue to operate his business during a strike) for the imposition of a reparations order? It seems plain, we submit, that such a remedy could be administered neither fairly nor effectively and was properly rejected by the Board (A. 239-240).

³⁵ (cont'd) they were improperly subjected. The Union cites no case support for this "unjust enrichment" theory, and we are aware of none. At pages 25-26 of its brief, the Union asserts: "The Board recognizes that Section 8(a)(5) cases frequently require a compensatory remedy to prevent the wrongdoing employer from profiting from his violation." In support of this assertion, the Union cites (Br. 26, n. 47) three cases, none of which, we submit, stands for this proposition. All three cases involved unlawful unilateral action by an employer that served to reduce monetary benefits that the employees had previously enjoyed, and in all three cases a reimbursement remedy was directed to make the employees whole by restoring the *status quo ante*. *Leeds & Northrup Co. v. N.L.R.B.*, 391 F.2d 874 (C.A. 3, 1968) (unilateral reduction in employees' percentage of profit-sharing plan; employer ordered to make payments on basis of plan that existed before the reduction); *Hooker Chemical Corp.*, 186 NLRB No. 49 (1970) (unilateral discontinuance of \$25 Christmas bonus; employer ordered to pay it); *A. H. Belo Corp.*, 170 NLRB No. 175 (1968) (unilateral decision not to grant regular periodic wage increases; employer ordered to pay increases based on formula established in prior years).

What the Union seeks here is to overturn the Board's decision regarding the selection of remedies and to compel the Board to impose a remedy in the face of its determination that such a remedy would not effectuate the policies of the Act. We are aware of no case where a court has done what the Union seeks to have this Court do. Even in *Tiidee I*, where, we submit, the Court went well beyond the issue in the case and discussed the question of the Board's statutory authority to issue a "compensatory damages" remedy, the Court did not require the Board to impose such a remedy but merely remanded the case to the Board to consider whether that remedy or some other one — greater or lesser in scope and impact — would be appropriate (138 U.S. App. D.C. at 249, 426 F.2d at 1253). The Board in this case, as in *Ex-Cell-O*, has done just that. As this Court held in *Tiidee I*: "There is a presumption that that favors the Board, with its expertise, in its selection of remedies. [footnote omitted] That presumption is given full effect when the Board makes a conscious selection of remedies to effectuate the Act, provided reasons for its conclusion are stated or may fairly be discerned." (138 U.S. App. D.C. at 256, 426 F.2d at 1250). Here, unlike the earlier cases (notes 23 and 24, *supra*), the Board made a "conscious selection of its remedies" and "reasons for its conclusions are stated"; in these circumstances, the presumption in the Board's favor is entitled to be "given full effect." Accord, *Local 57, I.L.G.W.U. v. N.L.R.B. (Garwin Corp.)*, 126 U.S. App. D.C. 81, 86 n. 7, 374 F.2d 295, 300 n.7, (1967), cert. denied, 387 U.S. 942; *United Steelworkers v. N.L.R.B. (Northwest Engineering Co.)*, 126 U.S. App. D.C. 215, 218, 376 F.2d 770, 773 (1967), cert. denied, 389 U.S. 932.

As both the majority (A. 234, 240) and the dissenting (A. 253-256) Board members in *Ex-Cell-O* acknowledged, a bargaining order is often "inadequate" to remedy an unlawful refusal to bargain and may fail to "eradicate the effects of an unlawful delay . . . in the fulfillment of a

statutory bargaining obligation." But, the majority concluded, "as the law now stands, the proposed remedy is for Congress, not the Board" (A. 240). In this, we submit, the Board properly followed the lead of the Supreme Court, which recognized in *H. K. Porter* that while "the present remedial powers of the Board are insufficiently broad to cope with important labor problems . . . it is the job of Congress, not the Board," to correct these deficiencies (397 U.S. at 109).

CONCLUSION

For the foregoing reasons, we respectfully request that the Union's petition for review in No. 24,704 be denied and that the Board's application for enforcement in No. 71-1082 be granted in full.³⁶

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March 1971.

³⁶ The Board's order requires, *inter alia*, that the Company cease and desist from "[d]iscouraging membership in [the Union] or any other labor organization" and further provides that the Company cease and desist from "[i]n any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7" (A. 191-194, 206-207). As the Fourth Circuit has noted, the Board clearly has the authority to issue such an order where, as here, the Company has discharged an employee for engaging in union activities, a violation which "goes to the very heart of the Act," and has also violated Section 8(a)(1) of the Act. *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536-537 (C.A. 4, 1941). Such violations bring the case within the rule of *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 437 (1941), requiring that the violations restrained "bear some resemblance" to those committed in the past, or that danger of their commission is to be anticipated from the Company's past conduct. Accordingly, courts have approved such orders in numerous cases involving facts similar to those involved in this case. See, e.g., *N.L.R.B. v. Bush Hog, Inc.*, 405 F.2d 755, 759 (C.A. 5, 1968); *N.L.R.B. v. Mayrath Co.*, 319 F.2d 424, 428 (C.A. 7, 1963); *Allegheny Pepsi-Cola Bottling Co. v. N.L.R.B.*, 312 F.2d 529, 532 (C.A. 3, 1962); *Central Mercedita, Inc. v. N.L.R.B.*, 288 F.2d 809, 812 (C.A. 1, 1961).



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IN THE
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United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 24 1971

RETAIL CLERKS UNION, LOCAL 1401,
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO,

Nathan J. Paulson
CLERK

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

No. 24704

Respondent,

and,

ZINKE'S FOODS, INC.,

Intervenor.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ZINKE'S FOODS, INC.,

No. 71-1082

Respondent,

and,

RETAIL CLERK'S UNION, LOCAL 1401,
RETAIL CLERKS INTERNATIONAL
ASSOCIATION, AFL-CIO,

Intervenor.

On Petition for Review and Application for Enforcement of an
Order of the National Labor Relations Board.

BRIEF FOR ZINKE'S FOODS, INC.

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BRIEF FOR ZINKE'S FOODS, INC.

ARGUMENT

A. The Company's Position on the §8(a)(1)
and (3) Violations in Case No. 71-1082.

As noted in the Board's typewritten brief on page 9,

the Company can not contest the Board's findings in this regard with the exception of the pre-election campaign letters. As to those, the Company does not now defend the Board's findings before this Court.

In this regard, however, it is noted that the Company's decision not to litigate the §8(a)(1) and (3) allegations was premised on its desire to isolate and contest only the question of whether the Board's bargaining order was technically infirmed by the manner and form in which the Union's objections to the election were filed. The obvious purpose was to avoid protracted and complex litigation as to the collateral alleged unfair labor practices and to arrive at a quick determination of whether the Board's recognition and bargain requirement with its concomitant vitiation of the election results adverse to the Union was technically valid. The Company was not adverse to bargaining with the Union if its agency was proper, which is substantiated by the labor contract which existed with the Meat Cutters Union.

Notwithstanding their uncontested state, comment must be made regarding their contended "flagrancy" in view of the novel damage issue which has been injected into this case by the Union in No. 24704. Thus, even a surface analysis of the "constructive" and not "actual" discharge, which occurred several weeks after the election, reveals

its marginal nature. The "constructive" discharge was based on work connected criticism directed at Kallas by the store manager. None of this criticism was shown to be unreasonable nor unjustified. Moreover, Kallas was shown to be a person sensitive to criticism as is demonstrated by the fact that many months before the Union's organizational drive, Kallas quit for being criticized as the "worse produce man" the store had ever had (J.A. 169-170). These factors show that the treatment of Kallas did not possess the "flagrancy" which the parties have and are expected to assert before this Court. Similarly, the §8(a)(1) unfair labor practices in their uncontested state are all in the nature of statements of opinion surrounding a union organizational campaign and are not bald surface threats or promises of what would occur if the Union was selected by the employees in the Board conducted election. As such, they too are "marginal" and not "flagrant" when measured by §8(c) 1/ standards and the law made and provided in regard to pre-election employer statements.

B. The Board's Bargaining Order is Not in Accordance With Law and Constitutes an Abuse of Discretion

As the Board noted in its brief, a bargaining order can not issue in a case where the Union loses an election "unless the election be set aside upon meritorious objections

1/ 29 U.S.C.A. §158(c).

filed in the representation case." Irving Air Chute Company, 149 NLRB 627, 629-630 (1964), enf'd., 350 F.2d 176 (CA-2, 1965).

The Company's basic concern was whether the Union's objections to the election were in accordance with the Board's requirements concerning timeliness and form. If they were not, then the objections can not serve as a basis for setting aside the election. For this reason, the claimed deficiencies of the Union's election objections presented a substantial question.

1. The Company is Not Precluded From Attacking In the Unfair Labor Practice Case the Timeliness or Form of the Union's Election Objections

At the hearing, the Company moved that the Trial Examiner dismiss the objections to the election filed by the Union because they were not timely filed and were not in the form or substance required by §102.69 2/ of the Board's Rules and Regulations (J.A. 174). In addition, the Company alleged in its answer to the Complaint of the General Counsel that "the Union did not file sufficient and timely objections to conduct affecting the results of the election, and, thus, the question of employee representation by the Union has been determined by the results of said election held on March 16, which results can not be set aside, nor a bargaining order be directed." (J.A. 40-41).

2/ 29 C.F.R. 232; amended July 1, 1970, 35 Fed. Register 10657.

The Board has taken the position that it could not consider the issues raised by the Company regarding the Union's election objections because the Company did not appeal from the Regional Director's report on the objections. The Board argues that the Company can not now attack the timeliness or form of the Union's election objections.

It is submitted that this conclusion and assertion by the Board is erroneous.

The chronology of the events between the election and the hearing is significant. This is as follows:

1. The Company filed a "Motion to Overrule Petitioner's Objections to Conduct Affecting the Results of Election" in Case No. 30-RC-400 on the ground that the objections filed were neither timely nor proper, and, therefore, could not be considered. This Motion was dated April 8, 1966 (J.A. 14-16).
2. On April 1 and 13, 1966, the Union filed charges of unfair labor practices which included inter alia the allegation that the Company had refused to bargain in violation of §8(a)(5). These charges were docketed as Case No. 30-CA-372 (J.A. 25-30).
3. The original Complaint and Notice of Hearing in Case No. 30-CA-372 was issued by the Regional Director on May 16, 1966 (J.A. 31-35).
4. On May 18, 1966, the Regional Director issued his report and recommendation concerning the Union's election objections in Case No. 30-RC-400. The Regional Director recommended that the representation and unfair labor practice cases be consolidated "for the purposes of hearing, ruling and decision by a Trial Examiner" (J.A. 17-21).

5. The Board adopted the Regional Director's report and recommendation in the representation case by its "Order directing hearing" which issued June 2, 1966 (J.A. 22-24).
6. The hearing on the Complaint in the representation case was conducted before the Trial Examiner on July 6, 1966 (J.A. 158).

The Company submits two arguments in support of its position.

First, the Company's motion to the Regional Director in the representation case did not affect the substantive issues of the objections, but raised a procedural question in an attempt to prevent the Regional Director from processing the objections. The nature of the motion was interlocutory. The decision by the Regional Director would not, therefore, affect any subsequent decision on the merits of the objections to the election. The Regional Director in fact did not consider the merits of the objections. He recommended that the issues created thereby "can most expeditiously be resolved by recourse to a hearing" and that the representation case should be consolidated with the unfair labor practice case in the interest of "avoiding undue costs and delay". (J.A. 20-21). Under this circumstance, common sense and sensible principles of practice and procedure would direct that the Company did not have to seek review of the denial of the interlocutory motion. The denial did not, in any manner, operate to the disadvantage of the Company. The complaint in the unfair labor practice

case had already issued and the refusal to bargain allegation raised the corollary issue as to whether the infirmity of the Union's election objections precluded the Board from setting aside the election results and establish by order the obligation to recognize and bargain with the Union as a remedy for the alleged §8(a)(5) unfair labor practice. The complaint provided an avenue for appeal of the Regional Director's denial of the motion. Any attempt or requirement to seek review of this procedural decision prior to the unfair labor practice hearing would have operated to delay the administrative proceeding. Moreover, had the Company excepted to the Regional Director's ruling it can reasonably be concluded, under the circumstances, that the same would have been perfunctorily referred to the Trial Examiner for consideration at the hearing already scheduled in the representation and unfair labor practice cases. Since the law does not require the doing of that which is futile, the failure of the Company to except to the Regional Director's report on the Union's election objections should not operate to foreclose further consideration of the Company's attack to the election objections as to timeliness and form. This issue was fundamental to the Company's defense to the §8(a)(5) allegation and should not be precluded by the treatment given to it by the Regional Director's truncated handling of the representative case.

Secondly, it is submitted that the Rules and Regulations covering determinations of issues connected with objections and review of the same do not establish a requirement that an appeal must be made from preliminary interlocutory decisions nor do they put a party on sufficient notice that decisions on procedural questions must be appealed in the representation proceeding when an unfair labor practice case covering identical facts has already been instituted. Thus §102.69(c) provides that when objections are filed to an election, the type of which is involved in this matter, "the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C.". The section further provides the right to except to the Board to the Regional Director's report. However, the language of this section allows the reasonable conclusion that this appeal or exception procedure applies only to substantive issues. This point is illustrated by assuming in the instant case that the Union had not filed unfair labor practice charges. Thus there would not have been an unfair labor practice hearing. Under those circumstances, had the Regional Director recommended a representation hearing to determine the merits of the objections because of factual issues after having denied the Company's Motion

to Dismiss, the Rules and Regulations are then silent or at least do not provide a clear answer as to where and when, if at all, a regional director's interlocutory decisions on procedural motions should be appealed. As a result, the most practical, efficient, logical and realistic approach would be to make the procedural matters part of the hearing. This would yield only one post-hearing appeal. This was the exact procedure followed by the Company in the instant case.

The Company's choice of action, under circumstances, where the Rules and Regulations do not clearly require separate appeals from interlocutory decisions in representation proceedings in order to preserve that question for an unfair labor practice case, should not operate as a waiver of the issues and thereby preclude the Company from attacking the timeliness and the form of the Union's election objections as this alleged infirmity applies to the refusal to bargain allegations. Amalgamated Clothing Workers of America v. NLRB (Sagamore Shirt Company), ___ U.S. App. D.C. ___, 365 F.2d 898 (CA-DC, 1966).

2. The Union's Election Objections Were Untimely and Not in the Form and Substance Required by §102.69 of the Board's Rules and Regulations

Section 102.69(a) provides in pertinent part as follows:

**** Within 5 days after the tally of ballots has been furnished, any party may file with the regional director an original and three copies

of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election."

After the March 16, election, the Union sent the following telegram to the Regional Office which was dated March 21, 1966:

"GENTLEMEN: PLEASE BE ADVISED THAT THE UNION OBJECTS TO THE ELECTION CONDUCTED IN THE ABOVE MANNER ON WEDNESDAY, MARCH 15. DURING THE COURSE OF THE ELECTION CAMPAIGN, THE COMPANY ENGAGED IN A COURSE OF CONDUCT WHICH BOTH COERCED THE EMPLOYEES IN THE EXERCISE OF THEIR FREE CHOICE IN VIOLATION OF SECTION 8A1 AND ADDITIONALLY THIS CONDUCT UPSET THE 'LABORATORY CONDITIONS' SURROUNDING THE ELECTION. A DETAILED STATEMENT OF POSITION WILL FOLLOW." (J.A. 11).

The Union filed its detailed objections by letter dated March 24, 1966, which was beyond the five day deadline date for timeliness.

The Board in its brief to this Court relies on Atlantic Mills Servicing Corporation of Cleveland, 120 NLRB 1284 (1958). As the Board points out, the Board therein interpreted the controlling section of the Rules and Regulations to require that objections "prima facie describe conduct which might warrant a new election." Atlantic Mills, supra, at p. 1288. In Atlantic Mills the objection under consideration alleged that the employer interfered with the election by engaging in "widespread interference prior to the election, including interrogation, implied threats, and sundry other activities

designed to influence the outcome of the election, all of which will be more clearly revealed upon full investigation." Atlantic Mills, supra, at p. 1286. The employer there contended that the objection did not satisfy the requirement of specificity and relied upon the authority of Don Allen Mid-Town Chevrolet, Inc., 113 NLRB 879 (1955). The Board found that the objection "to the employer's acts of interrogation identified conduct, which prima facie would warrant setting the election aside, and therefore satisfy the degree of specificity demanded by §102.61, Series 6, as amended, of the Rules and Regulations." Atlantic Mills, supra, at p. 1287.

The Company contends that the Union's telegram does not satisfy the Atlantic Mills test because it does not identify conduct which would warrant setting aside the election. The Union's telegram was couched in conclusionary terms. In this regard, the case is not unlike the situation in General Electric Company, 103 NLRB 108 (1953) where the union sent the following telegram to the Board as a basis for their objections:

"This is to advise our intention of filing with your office a protest of the Board ordered election in the matter of General Electric Co., Fractional Horsepower Division, Tiffin, Ohio and International Union of Electrical, Radio and Machine Workers, CIO, such protest will immediately follow." (General Electric Company, supra, at p. 108).

The Board ruled that the telegram did not comply with the requirements of the Rules and Regulations and concluded that the telegram "was nothing more than a notice to the regional director of future action which a petitioner proposed to take and which in no way affected the necessity of proper objections being filed within the 5 day period prescribed in Section 102.61, if they were to be timely." General Electric Company, supra, at p. 109.

If the standard of "prima facie" is to mean anything, at least under the Atlantic Mills test, it requires that election objections must identify the type of conduct upon which the objecting party is relying to set aside the election results in order to satisfy the 5 day Board created time limitation. The position advanced by the Board writes out of the Rules the limitation requirement and completely ignores the commonly accepted meaning of "prima facie".

The Union's objection elections in the form of the telegram were defective and its detailed letter of objections which was subsequently filed could not cure the infirmity. Under those circumstances, the election results can not be set aside and, measured by the authority if Irving Air Chute, supra, the Board abused its discretion and acted outside the reaches of the law in setting aside the election results and concomitantly ordering the Company to recognize and bargain with the Union.

C. The Union's Request for Compensatory Damage
Remedy

If this Court sustains the Company's argument that the Union's election objections were defective, then it follows that the Union's request for the compensatory damage remedy must be dismissed.

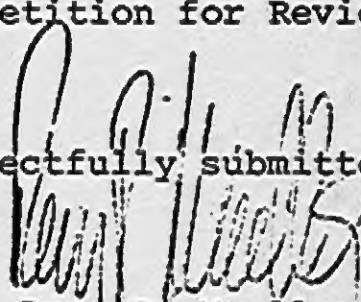
Absent such a decision, the Company submits that the Union's Petition must yet be dismissed. The Company limits its argument in this regard to the contention that its desire to obtain an authoritative disposition of the claim that the Union's election objections were defective was not "patently frivolous". The Company is seeking an authoritative determination of the validity of the setting aside of the election and the Board's order requiring recognition and bargaining with the Union. Cf., International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB (Tiddee Products), ___ U.S. App. D.C. ___, 426 F.2d 1243, (CA-DC, 1970), cert. den. 400 U.S. 950 (1970); United Steelworkers of America, AFL-CIO v. NLRB, (Quality Rubber Mfg. Co.), ___ U.S. App. D.C. ___ 430 F.2d 519 (CA-DC, 1970). The validity of setting aside the election results was debatable and, therefore, the issues respecting the Union's election objections were not frivolous. Southwest Regional Joint Board v. NLRB (Levi Straus & Co.), ___ U.S. App. D.C. ___, ___ F.2d ___ (CA-DC, 1970) 76 LRRM 2033.

This case, therefore, is identical to the Ex-Cell-O cases (Nos. 24577 and 24615 - International Union UAW v. NLRB; Ex-Cell-O Corp. v. NLRB) in that the refusal to bargain in violation of §8(a)(5) is a technical violation in order to obtain an appellate determination of issues determined in the accompanying representation case which affect the validity of the requirement to recognize and bargain with the Union. Thus, a different result can not be had on the Union's compensatory damage remedy request as is rendered in the Ex-Cell-O cases. In both, this Court's most recent pronouncements on the issue require a dismissal of the claim.

CONCLUSION

For the reasons stated hereinbefore, it is respectfully requested that the Board's Application for Enforcement in Case No. 71-1082 and the Union's Petition for Review in Case No. 24704 be dismissed.

Respectfully submitted,


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